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West Virginia's Seemingly Eternal Struggle for Fiscally and Environmentally Adequate Coal Mining Reclamation Bonding Program

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WEST VIRGINIA'S SEEMINGLY ETERNAL STRUGGLE FOR A FISCALLY AND ENVIRONMENTALLY ADEQUATE COAL MINING RECLAMATION BONDING PROGRAM

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I. INTRODUCTION

Coal mining significantly contributes to West Virginia's economy.² Coal mining also disturbs West Virginia's environment during, and sometimes after, its pendency.

Multiple laws have been enacted over the years in an effort to avoid, minimize, and correct environmental disturbances caused by mining. Unfortunately, these laws have not fully prevented, minimized, or resulted in the correction of mining's environmental disturbances. As a result, today a number of abandoned mine sites sit unreclaimed, and polluted streams affected by some of those abandoned mining sites go untreated. In 1999, it was estimated that 481 waterways, and 2,852 miles of those waterways, in West Virginia were damaged by pollution discharges from abandoned mine sites.³

Recent changes in West Virginia's reclamation bonding laws have attempted to reduce the number of West Virginia's post-1977 unreclaimed, abandoned mine sites and the pollution being caused by those sites. In particular,

² According to one estimate, the coal mining industry currently accounts for roughly 13% of West Virginia's economic output and produces 27% of West Virginia's business tax revenues and approximately 10% of the state's property tax collections. See OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, ANNUAL EVALUATION SUMMARY REPORT FOR THE REGULATORY AND ABANDONED MINE LAND RECLAMATION PROGRAMS ADMINISTERED BY THE STATE OF WEST VIRGINIA FOR EVALUATION YEAR 2003 2-3 [hereinafter ANNUAL EVALUATION SUMMARY 2003], available at <http://www.osmre.gov/oversight/westvirginia03.pdf>. In 2001, West Virginia produced 163.2 million tons of coal. *Id.* at app. A. In 2002, West Virginia produced 150.6 million tons of coal. *Id.* This amount of coal production has resulted in West Virginia being the second largest coal producing state in the United States during the last several years. *Id.* at 2. During this same time period, Wyoming was the state that produced the largest amount of coal in the United States. See OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, ANNUAL EVALUATION SUMMARY REPORTS FOR THE REGULATORY AND ABANDONED MINE LAND RECLAMATION PROGRAMS ADMINISTERED BY THE STATE OF WYOMING FOR EVALUATION YEARS 2002 AND 2003, available at <http://www.osmre.gov/oversight/wyoming03.pdf>.

³ Steve Myers, *Mining's Toll on Land Was Heavy; Environment's Recovery From Mining Will Take Time*, CHARLESTON DAILY MAIL, May 7, 1999, at 1A, available at LEXIS, News Library, Charleston Daily Mail File.

those changes provide greater funding and discretion to the West Virginia Department of Environmental Protection ("DEP") to reclaim those abandoned mine sites.⁴

This article gives a historical perspective on the development of West Virginia's reclamation bonding laws over the last sixty-four years. Section II of the article briefly reviews West Virginia's pre-1977 development of a government program to reclaim abandoned mine sites. Section III of the article describes West Virginia's current reclamation bonding program for post-1977 mining sites. Section IV describes the unique bonding problems that pollution discharges from mines pose, and Section V describes historical inadequacies in West Virginia's reclamation bonding program. Section VI both recounts and analyzes recent attempts to improve West Virginia's reclamation bonding program through legislation and other means while Section VII briefly gives review and comment by the United States District Court for the Southern District of West Virginia on the changes made by Senate Bill 5003 to West Virginia's bonding and reclamation program. Section VIII of the article analyzes the effect of these recent changes as measured by data collected and assembled by and for the Special Reclamation Advisory Council. Section IX offers a brief prediction on the future of the current laws relating to West Virginia's Special Reclamation Program.

II. WEST VIRGINIA'S PRE-1977 RECLAMATION OF ABANDONED COAL MINING SITES

In 1939, the West Virginia Legislature first recognized the need to regulate surface coal mining in West Virginia through its passage of House Bill 390.⁵ House Bill 390 was the first law in the United States which set performance standards the coal industry was required to meet while mining coal.⁶ House Bill 390 contained several important provisions, among them were provisions which: (1) required a person extracting coal for commercial purposes to obtain a permit authorizing such extraction prior to extraction, (2) required mined land be re-contoured to a condition that approximated the pre-mining condition of the land, (3) required coal operators to "minimize hazards to . . .

⁴ The regulatory entity in West Virginia in charge of regulating the surface effects of underground coal mining and surface coal mining is currently known as the West Virginia Department of Environmental Protection. The Department of Environmental Protection has previously been known by several different names, including the Division of Energy and the Division of Environmental Protection. For ease of reading, this article will use the generic term "DEP" to refer to all of those entities.

⁵ Interoffice Memorandum from Roger T. Hall, West Virginia Division of Environmental Protection, to Dennis Boyles, Office of Surface Mining, Ben Greene, West Virginia Mining and Reclamation Association, and Bill Raney, West Virginia Coal Association 3 (Sept. 29, 1998) (on file with author).

⁶ *Id.*

pollution of streams,”⁷ and (4) required each mining operation to post a reclamation performance bond with the State for each mining permit that the operation received from the State.⁸ This performance bond was required in an attempt to ensure that if a coal company defaulted on its obligation to reclaim the mined land after mining had been completed, there would still be a reserve of money (i.e. the reclamation bond) that could be used to pay for necessary reclamation.

Despite these regulatory efforts and the creation of a vehicle to pay for the reclamation of an abandoned coal mining site, many coal companies left their mining sites unreclaimed after completing their mining operations and West Virginia was stuck with paying for the reclamation of the abandoned mine site. When the State could collect the performance bond associated with the abandoned mine site, the amount of money collected was often less than the amount of money it took to pay for reclamation.

In 1963, the West Virginia Legislature revisited the issue of regulating coal mining and imposed a special fee of \$30 per acre on areas to be disturbed by mining.⁹ The Legislature also required each mining operator to post a reclamation bond for a site in the amount of \$500 per acre.¹⁰ The \$30 fee imposed by the Legislature was directed into a fund, referred to as the Special Reclamation Fund (“SRF”), which the State used for the restoration and reclamation of lands disturbed by a coal mining entity but abandoned by that entity prior to the time that entity completed site reclamation.¹¹ The SRF attempted to reclaim as many abandoned mine sites as possible.¹² Unfortunately, the SRF reclaimed only a small percentage of those lands that had been previously abandoned.¹³

On these pre-1977 sites, the State backfilled open mining pits “with the great mounds of rock and soil that had been indiscriminately cast aside to expose and extract the coal.”¹⁴ “In many cases, there was insufficient material available or it was not cost effective to [also] eliminate [the] highwalls” which had been created during the mining operation.¹⁵ As a result, level benches and exposed highwalls, which typically coursed along the coal seam along with the

⁷ *Id.* At the time House Bill 390 was passed, “stream pollution” meant erosion, siltation, and coal fines. *Id.* Later, this term took on a broader meaning, encompassing other types of stream pollution such as Acid Mine Drainage. *Id.* at 4.

⁸ *Id.* at 3.

⁹ W. VA. DIV. OF ENVTL. PROT., DEP’T OF COMMERCE, LABOR, & ENVTL. RES., ACID MINE DRAINAGE BOND FORFEITURE REPORT 1 (1993) [hereinafter BOND FORFEITURE REPORT].

¹⁰ *Id.*

¹¹ Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 6.

¹⁵ *Id.*

natural contours of the land, were left on the permitted site following the completion of the State's reclamation of the site.¹⁶ Water ran over the face of the exposed highwalls during the weathering process and leached various minerals out of the open rock face.¹⁷ This leaching out of minerals from the exposed highwall face caused pollution discharges from mining, including in some cases, acid mine drainage ("AMD").¹⁸ While that reclamation result is today seen as unacceptable, at that time the production of AMD from the exposed highwall was not seen as a major problem. Indeed, prior to 1977, the elimination of AMD and other pollution discharges was more often by chance than design, as treatment and elimination of these discharges was not in and of itself a goal of West Virginia's Special Reclamation Program.¹⁹

Between 1968 and 1971, many West Virginia residents became part of a nationwide movement which called for environmental reform.²⁰ One of the goals of this movement was to abolish surface coal mining in its entirety.²¹ While this goal was never met, the movement did succeed in achieving several other goals. The success of this movement was reflected in legislation passed by the West Virginia Legislature in the early 1970s. For example, in the early 1970s, the Legislature prohibited mining operations in 22 of West Virginia's 55 counties.²² The Legislature also expanded the regulation of mining and reclamation, increased the SRF fee from its previous rate of \$30 per acre of mined land to a rate of \$60 per acre of mined land, and increased the per acre bonding rate from \$500 to \$1000.²³ While these moves generated more revenue for the Special Reclamation Program, they still did not produce enough revenue to pay for reclamation of all abandoned mine sites.

In 1974 and again in 1976, the State Legislature amended the West Virginia Surface Mining Act to regulate both surface coal mining operations and the surface effects of underground mining operations.²⁴ As a result of this

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* Acid mine drainage is defined legally as "water discharged from an active, inactive, or abandoned surface mine and reclamation operation or from areas affected by surface mining and reclamation operations with said water having a pH of less than six (6.0) in which total acidity exceeds total alkalinity." W. VA. CODE ST. R. § 38-2-2(2.3) (2004). Acid mine drainage from bituminous coal mines contains high concentrations of acidic sulfates, especially ferrous sulfates. DICTIONARY OF MINING TERMS 7 (Paul W. Thrush ed., Maclean Hunter Publishing Company 1990) (1968).

¹⁹ Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 6.

²⁰ *Id.* at 5.

²¹ *Id.*

²² *Id.*

²³ BOND FORFEITURE REPORT, *supra* note 9, at 1.

²⁴ Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 6.

change, both underground and surface coal mining permittees were required to post bonds which would insure the reclamation of surface areas in the event that the permittee defaulted on his obligation to complete site reclamation.²⁵

The new requirements regulating surface effects of underground mining were helpful because they ensured that surface areas disturbed by both underground and surface mining would not be left to harm the environment following mining. However, these new requirements also placed additional financial burdens on both coal mining permittees and DEP. Because of the change in the law, whenever an underground mining operation did not properly reclaim its surface disturbances, the State became financially responsible for the reclamation of those disturbances.

III. THE PASSAGE OF SMCRA AND ITS BONDING REQUIREMENTS

By 1977, a large number of mining sites, not only in West Virginia but also across the nation, lay abandoned and unreclaimed. The Surface Coal Mining and Reclamation Act ("SMCRA") was passed by the United States Congress in August 1977 in response to many problems associated with the mining industry, including the large number of unreclaimed or under reclaimed sites which were being produced as a result of various coal mining operations.²⁶

SMCRA requires that, following the completion of mining extraction activities, a permittee must reclaim, or pay for the reclamation of, the mined site in accordance with SMCRA's various performance requirements.²⁷ To assure this will be done, SMCRA requires the permittee to do two things before beginning mining operations: (1) submit a reclamation plan to the appropriate regulatory authority demonstrating how the mining operator will comply with SMCRA's reclamation standards;²⁸ and (2) post a reclamation bond after the permit application has been approved but before mining starts.²⁹ Reclamation bonds are controlled by statutory requirements; when the terms of a bond conflict with statutory requirements, the statute controls.³⁰ The reclamation bond is important because it assures that if the permittee does not properly reclaim environmental disturbances created during mining, those disturbances will still be reclaimed.³¹

²⁵ *Id.*

²⁶ *See* 30 U.S.C. § 1201(h) (2000).

²⁷ *See id.* §§ 1259(a), 1265(b); OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, OVERVIEW: RECLAMATION BONDS FOR COAL MINING OPERATIONS, *available at* <http://www.osmre.gov/bonding.htm> (Dec. 30, 2002).

²⁸ *See* 30 U.S.C. § 1257(d).

²⁹ *See id.* § 1259(a).

³⁰ *See* *Martin v. Dep't of Env'tl. Res.*, 570 A.2d 122, 126 (Pa. Commw. Ct. 1990).

³¹ *See* 30 U.S.C. § 1259(a). The requirement to post a reclamation bond for each operation

The United States' Office of Surface Mining and Reclamation Enforcement's ("OSM's") rules recognize three major categories of reclamation bonds: (1) corporate surety bonds, (2) collateral bonds (including cash, certificates of deposit, first-lien interests in real estate, letters of credit, federal, state or municipal bonds, and investment-grade securities), and (3) self bonds (i.e. legally binding corporate promise with or without separate surety, available only to permittees who meet certain financial tests).³² A surety reclamation bond is a guarantee that a third party surety will either perform the defaulting permittee's reclamation obligations or pay the regulatory authority (the obligee on the bond) a sum certain if the principal (the operator) fails to perform reclamation as required by the bond agreement.³³ A collateral bond is an indemnity agreement executed by the permittee and supported by a deposit with the regulatory authority of cash, negotiable bonds, certificates of deposit, letters of credit or certified checks in the full amount of the bond.³⁴ A self-bond is an indemnity agreement executed by the permittee, the permittee's parent company, or a qualified third party.³⁵

The regulatory authority implementing the traditional Section 509(a) SMCRA bonding scheme will require the reclamation bond to be performance in nature, though a regulatory authority implementing an Alternative Bonding Program may require the bond to be penal in nature.³⁶ If the reclamation penal bond is backed by a third party surety, the surety has the option of paying the amount of the forfeited bond to the obligee or performing the permittee's reclamation obligations upon the permittee's default.³⁷ As provided by 30 C.F.R. §

permitted under SMCRA was thought by Congress to be a vital component of a nationwide program to control coal mining's impacts on the environment. S. REP. NO. 95-128, at 78 (1977). In describing the reclamation bond provisions of the Act, the Senate Committee on Energy and Natural Resources referred to SMCRA's bonding scheme as "one of the most important aspects of [a] program to regulate surface mining and reclamation." *Id.*

³² See 30 C.F.R. § 800.5 (2004).

³³ See *id.* § 800.5(a); see also Barlow Burke, *Reclaiming the Law of Suretyship*, 21 S. ILL. U. L.J. 449, 470 (1997).

³⁴ See 30 C.F.R. § 800.5(b); see also *id.* § 800.21.

³⁵ See *id.* § 800.5(c).

³⁶ Performance bonds are required by the terms of SMCRA itself. See 30 U.S.C. § 1259(a). The decision in *In re Permanent Surface Mining Regulation Litigation* cast doubt on whether penal bonds may be used by states that implement a traditional SMCRA bonding program. 14 ERC (BNA) 1083, 1100-01 (D.D.C. 1980), *aff'd in part and rev'd in part*, 14 ERC (BNA) 1813 (D.C. Cir. 1980). However, at least according to OSM, penal bonds may clearly be required by a state regulatory agency, such as the West Virginia's Department of Environmental Protection, that is implementing an Alternative Bonding Program in lieu of the traditional bonding program established by 30 U.S.C. § 1259(a). See West Virginia Regulatory Program, 60 Fed Reg. 51,900 (October 4, 1995). See *infra* Part IV for a discussion concerning Alternative Bonding Systems.

³⁷ See Burke, *supra* note 33, at 470.

800.50(d)(2), if the amount of the forfeited performance bond is more than the amount necessary to complete the reclamation, any unused funds must be returned to the party from whom they were collected.³⁸ If the reclamation bond is a penal one, the amount of the bond is typically taken in forfeiture by the regulatory authority, and all proceeds of the bond are retained by the regulatory authority regardless of the actual cost of site reclamation the bond was designed to ensure.³⁹

Prior to SMCRA, reclamation bonds were often set so low that it cost the mining permittee more money to reclaim environmental disturbances created during mining than to simply leave the mined site unreclaimed, forgo the return of the bond from either the regulatory agency or a third party surety, and repeat this process whenever the permittee moved on to another mine site.⁴⁰ As a result of this financial advantage in not completing reclamation, the permittee might mine several permitted areas successively without completing reclamation on any of them. This practice was be advantageous to the permittee but disadvantageous to the environment.

Four features of SMCRA are designed to chill this environmentally irresponsible practice. First, if a permittee does not complete his or her reclamation responsibilities and the regulatory authority is forced to issue violations against the permittee, revoke the permittee's permit, and forfeit the reclamation bond associated with the permit, the defaulting permittee is blocked from receiving future mining permits in the United States.⁴¹ Second, the regulatory authority can collect from the permittee the difference between the total cost of reclaiming the permit and the amount of the bond posted for the permit if the posted bond is not large enough by itself to pay for site reclamation.⁴² As observed by one court, "the imposition of all [excess] reclamation costs on [coal] operators is consistent with and supported by the legislative history of SMCRA."⁴³ Third, the regulatory agency, not the operator, is the entity that determines how much it

³⁸ 30 C.F.R. § 800.50(d)(2).

³⁹ See Burke, *supra* note 33, at 470.

⁴⁰ See Robert Costanza and Laura Cornwell, *The 4P Approach to Dealing With Scientific Uncertainty*, 34 ENV'T 9 (1992).

⁴¹ See 30 U.S.C. § 1260(c) (2000).

⁴² See 30 C.F.R. § 800.50(d)(1); see also OLGA BRUNNING, OFFICE OF SURFACE MINING, U.S. DEPT' OF THE INTERIOR, COALEX REPORT 251 (1993), available at <http://www.omre.gov/coalex/coalex251.htm> (quoting H.C. Bostic Coal Co., Inc. and Wayne Bostic v. OSM, Docket Nos. NX-88-8-R. et al., Interior Administrative Decisions 1991)). West Virginia has a counterpart to 30 C.F.R. § 800.50(d)(1). See W. VA. CODE ST. R. § 38-2-12(12.4) (2004). While this option is available to the regulatory authority in theory, it is often not available in practice as the company whose permit the authority is attempting to reclaim is often bereft of assets and thus collection of such excess reclamation costs is rendered impossible.

⁴³ Cat Run Coal Co. v. Babbitt, 932 F. Supp. 772, 780 (S.D. W. Va. 1996).

will cost to reclaim the mined land.⁴⁴ Fourth, and perhaps most importantly, a reclamation bond required pursuant to SMCRA is designed to pay for all projected costs of reclamation in the event the permittee is unable (or unwilling) to complete the reclamation.⁴⁵

When calculating how much the reclamation bond should be, the regulatory agency must examine how much it will cost it to complete the permit's reclamation plan and adhere to all environmental performance standards in the process.⁴⁶ According to OSM, bond calculations should "reflect the 'worst case scenario', i.e., the cost of reclaiming the site if the permittee forfeits the bond at the point of maximum reclamation cost liability, under the reclamation and operation plans approved as part of the permit."⁴⁷ If OSM has approved an "Alternative Bonding System" within a state that has achieved primacy,⁴⁸ that Alternative Bonding System "must [also] assure that the regulatory authority will have available sufficient money to complete the reclamation plan for any areas which may be in default at any time."⁴⁹

It is significant that the regulatory agency must calculate the reclamation bond amount based on how much it will cost the regulatory agency, not the mining entity, to complete reclamation. Often it will cost a regulatory agency more money to complete reclamation of an unreclaimed site than it would have cost the mining entity to perform the same reclamation of that site. One reason for this is that a public agency such as DEP must pay laborers and contractors on a government financed reclamation project more money than those laborers and contractors might have to be paid if those laborers and contractors were working directly for the mining entity. Whereas a contractor working for a private mining entity would be able to negotiate the hourly wage rates paid to electricians, carpenters, etc., a state agency such as DEP does not have this luxury. DEP must, through the contractor it hires, pay a skilled laborer a minimum hourly rate on each contract it lets.⁵⁰ The establishment of an artificial floor for wage rates makes the overall cost of reclamation higher on each contract let by

⁴⁴ See 30 U.S.C. § 1259(a); see also 30 C.F.R. 800.14(a).

⁴⁵ See 30 U.S.C. § 1259(a); 30 CFR 800.50(b)(2).

⁴⁶ See 30 U.S.C. § 1259(a).

⁴⁷ OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, HANDBOOK FOR CALCULATION OF RECLAMATION BOND AMOUNTS 6 (2000), available at <http://www.osmre.gov/directives/directive882a.pdf> [hereinafter HANDBOOK FOR CALCULATION OF RECLAMATION BOND AMOUNTS]; see also *W. Va. Highlands Conservancy v. Norton*, 238 F. Supp. 2d 761, 766 (S.D. W. Va. 2003); OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, RECLAMATION BONDING REQUIREMENTS AT THE WESTERN REGIONAL COORDINATING CENTER (2002), available at <http://www.osmre.gov/bonding.htm>.

⁴⁸ See *infra* Part IV.

⁴⁹ 30 C.F.R. § 800.11(e).

⁵⁰ See W.Va. Code § 21-5A-1 to -11 (2004).

the DEP and makes it more expensive than it otherwise would be for DEP to reclaim the abandoned mine site. Unfortunately, DEP cannot pass the higher cost of reclaiming the abandoned mine land onto the operator as the operator is, by the time that such reclamation is needed, usually bankrupt or bereft of assets.

IV. WEST VIRGINIA'S IMPLEMENTATION OF SMCRA'S BONDING REQUIREMENTS

SMCRA permits a state to assume primacy for the regulation of surface coal mining and reclamation operations within its borders by demonstrating that its program includes a "state law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements" of SMCRA and rules and regulations consistent with regulations issued by the Secretary of the Interior pursuant to SMCRA.⁵¹ While there is some debate as to whether and to what extent SMCRA is "pre-empted" in a state that has achieved primacy over the regulation of coal mining within its borders, it can be fairly said that a state that has achieved primacy administers its own regulatory program over mining within that state. West Virginia made several attempts to obtain primacy over the regulation of coal mining within its borders following the passage of SMCRA in 1977.⁵² West Virginia finally obtained primacy over its coal mining regulatory program on January 21, 1981.⁵³ The statutory portion of West Virginia's primacy program is known as the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA").⁵⁴

⁵¹ 30 U.S.C. § 1253(a)(1), (7).

'State primacy' refers to the period of time during which a state's surface mining regulatory program has the primary role in the enforcement of surface mining statutes and regulations in accordance with federal guidelines. During this period, the federal government, through the Office of Surface Mining (OSM) in the United States Department of the Interior, assumes an oversight function.

Burke, *supra* note 33, at 463 n.65.

⁵² In response to the passage of SMCRA in 1977, the West Virginia Legislature passed and amended various state statutes in its attempt to achieve primacy over the regulation of coal mining in West Virginia. On March 3, 1980, West Virginia presented its permanent program for primacy to the United States Department of the Interior for approval. *See* Partial Approval/Partial Disapproval of the Permanent Program Submission from the State of West Virginia Under the Surface Mining Control and Reclamation Act of 1977, 45 Fed. Reg. 69,249, 69,249 (Oct. 20, 1980). In response, the Secretary of the Interior approved the program in part and disapproved it in part on October 20, 1980. *Id.*

⁵³ On December 19, 1980, West Virginia resubmitted its proposed permanent program package with required amendments that the Secretary of the Interior conditionally approved on January 21, 1981. *See* Conditional Approval of the Permanent Program Submission from the State of West Virginia Under the Surface Mining Control and Reclamation Act of 1977, 46 Fed. Reg. 5915, 5915 (Jan. 21, 1981).

⁵⁴ While "SCMRA" technically refers only to the provisions of the West Virginia Code that regulate the environmental effects of coal mining, the term "SCMRA" will be used throughout

Section 509(c) of SMCRA gives states who have achieved primacy over the regulation of coal mining within their borders the option to establish an alternative to the traditional reclamation bonding scheme set forth by Section 509(a) of SMCRA.⁵⁵ This "Alternative Bonding System" must achieve the objectives and purposes of the otherwise mandatory conventional bonding program established by Section 509(a) of SMCRA.⁵⁶ Specifically, the Alternative Bonding System must: (1) assure that sufficient funds are available to complete the reclamation plans for any mining areas in default at any time; and (2) provide a substantial economic incentive for the operator to comply with all reclamation requirements.⁵⁷ Though the United States Congress did not specify how SMCRA Section 509(c) Alternative Bonding Systems should be financed, OSM has stated that

an Alternative Bonding System cannot be allowed to incur a deficit if it is to have available adequate revenues to complete the reclamation of all outstanding bond forfeiture sites. Alternative Bonding Systems must include reserves and revenue-raising mechanisms adequate to ensure completion of the reclamation plan and fulfillment of the permittee's obligations, including any water treatment needs.⁵⁸

Under the rulings of *Canestraro v. Faerber*,⁵⁹ *Shultz v. Consolidation Coal*,⁶⁰ and a litany of subsequent West Virginia Supreme Court decisions, SCMRA in general must be consistent with and as stringent as federal SMCRA.⁶¹ Under these decisions, however, the provisions of West Virginia's

this article to refer to all parts of West Virginia's primacy program, including provisions found in the Code of State Rules which are part of that program.

⁵⁵ 30 U.S.C. § 1259(c).

⁵⁶ See *id.*

⁵⁷ See 30 CFR § 800.11(e) (2004).

⁵⁸ West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,910 (Oct. 4, 1995). Unfortunately, these goals are not always met. For example, during 2002, the State of Maryland faced a \$524,760 deficit in its Alternative Bonding System. UNITED STATES OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, PITTSBURGH FIELD DIVISION, ALTERNATIVE BONDING SYSTEM STATUS UPDATE, MARYLAND REGULATORY PROGRAM 3 (2004) (on file with author). Due to changes in Maryland's Alternative Bonding System, however, it is projected that this deficit will be eliminated by the end of the year 2004. *Id.*

⁵⁹ 374 S.E.2d 319 (W. Va. 1988).

⁶⁰ 475 S.E.2d 467 (W. Va. 1996).

⁶¹ See *Canestraro*, 374 S.E.2d at 320; *Shultz*, 475 S.E.2d at 475-76. The provisions of SCMRA can also be more stringent than SMCRA, though as a practical matter, it has appeared to this attorney in his practice that such a situation seldom occurs. For provisions of state SCMRA to be more stringent than SMCRA, the Secretary of the Department of Environmental Protection

SCMRA do not have to be exactly the same as those of SMCRA. This distinction, along with the Alternative Bonding System provisions of Section 509(c) of SMCRA, have allowed West Virginia to establish an Alternative Bonding System which exhibits characteristics different than those of a traditional SMCRA Section 509(a) reclamation bonding program.

The basic form of West Virginia's Alternative Bonding System today is essentially a result of changes to West Virginia mining laws made by the West Virginia Legislature in 1978. These 1978 changes included: (1) replacing the previous \$60 per acre mine fee with a one cent per ton tax on coal produced, (2) consolidating in one central fund monies accrued as a result of bond forfeitures, (3) providing that civil penalties collected pursuant to the West Virginia regulatory program be placed in the SRF, (4) raising the bond rate from seven hundred and fifty dollars (\$750) dollars to one thousand dollars (\$1000) per disturbed acre, (5) providing that the State mining regulatory agency could spend a reasonable sum of money on its administration of the state mining and reclamation program, and (6) diverting the emphasis of West Virginia's reclamation efforts away from sites which could be reclaimed under SMCRA's Abandoned Mine Lands program towards sites which were not eligible for funding under SMCRA's Abandoned Mine Lands reclamation law.⁶²

Today, West Virginia's Alternative Bonding System has two major financial components: (1) the reclamation bond posted by the permittee, and (2) the Special Reclamation Fund ("SRF"), which is comprised of a special reclamation tax, forfeited reclamation bonds, administrative civil penalties collected by DEP, and interest which accrues on the amounts contributed to the SRF by the preceding three sources.⁶³ The special reclamation tax is a tax on clean coal mined in West Virginia.⁶⁴

must first provide

specific written reasons which demonstrate that such provisions are reasonably necessary to protect, preserve or enhance the quality of West Virginia's environment or human health or safety, taking into consideration the scientific evidence, specific environmental characteristics of West Virginia or an area thereof, or stated legislative findings, policies or purposes relied upon by the [Secretary] in making such determination. In the case of specific rules which have a technical basis, the director shall also provide the specific technical basis upon which the director has relied.

W. VA. CODE § 22-1-3a (2004). Importantly, West Virginia Code section 22-1-3a continues on to say that "in the absence of a federal rule, the adoption of a state rule shall not be construed to be more stringent than a federal rule, unless the absence of a federal rule is the result of a specific federal exemption." *Id.*

⁶² See Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 7-8. Realizing that even at the increased bond per acre rate a site's bond might not be sufficient to reclaim a site, the West Virginia Legislature apparently intended that the SRF make up the difference between the permitted area's bond amount and the amount it took to actually reclaim that site upon forfeiture. *Id.*

⁶³ See W. VA. CODE §§ 22-3-11(g)-(l), -17(b), (d)(2).

To meet SMCRA's reclamation bonding requirements, permittees are allowed to file either a single reclamation bond or separate incremental bonds for their mining operation.⁶⁵ Under a single reclamation bonding scheme, the bond posted at the time of permit issuance must cover all areas subject to the permit, even though some sections within the bonded area may not be disturbed until sometime in the future.⁶⁶ Under an incremental bond scheme, the mining permit area is divided into discrete portions.⁶⁷ Each of these portions is bonded separately from one another.⁶⁸ While incremental bonding might appear attractive to coal companies because it prevents them from having to post such a large bond before they start mining, incremental bonding is sometimes unattractive because if DEP forfeits a bond, even an incremental bond, this forfeiture prevents the permittee from getting future mining permits.⁶⁹

Bonds posted under West Virginia's Alternative Bonding System were formerly performance bonds;⁷⁰ however, they are now penal in nature.⁷¹ Under the penal reclamation bonding scheme, the obligee (that being the State of West Virginia and the West Virginia Department of Environmental Protection) need not prove actual damages at the time of bond forfeiture as a prerequisite for collecting the entire bond amount.⁷² Further, the DEP need not make any pre-forfeiture inquiry into whether there are less stringent means of enforcement against the permittee that do not require DEP to declare forfeiture and collect the bond.⁷³

Regardless of whether these are single or incremental in nature, West Virginia's current penal reclamation bonds may not be less than \$1,000 per acre nor more than \$5,000 per acre.⁷⁴ Modifying this minimum per acre rate is West Virginia Code section 22-3-11(a) which provides that the minimum amount of a bond required for a permit must be at least \$10,000.⁷⁵ Thus, under the excep-

⁶⁴ See *id.* § 22-3-11(h).

⁶⁵ See *id.* § 22-3-11(a).

⁶⁶ See *id.*; see also GARY MERRITT, DEP'T OF ENVTL. RES., COALEX COMPARISON REPORT 37 (1985) (on file with author).

⁶⁷ See W. VA. CODE § 22-3-11(a); see also MERRITT, *supra* note 66.

⁶⁸ See MERRITT, *supra* note 66.

⁶⁹ W. VA. CODE § 22-3-18(c).

⁷⁰ See *State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Envtl. Prot.*, 447 S.E.2d 920, 923 (W. Va. 1994).

⁷¹ See W. VA. CODE §§ 22-3-11(a), -12(b)(1).

⁷² See Burke, *supra* note 33, at 478.

⁷³ See *id.*

⁷⁴ W. VA. CODE §§ 22-3-11(a), -12(b)(1).

⁷⁵ W. VA. CODE § 22-3-11(a).

tion established by West Virginia Code section 22-3-11(a), if a permit is less than 10 acres in size, that permit must still feature a reclamation bond that is at least \$10,000.⁷⁶

Because of the \$5,000 per acre statutory restriction on the size of reclamation bonds, reclamation bonds posted for a particular West Virginia mining operation are sometimes less than the amount of money required to actually reclaim the permitted area. When this happens, West Virginia's Alternative Bonding System is supposed to provide funding to make up this difference.⁷⁷ Unfortunately, this has, historically, not fully occurred.

V. BONDING POLLUTION DISCHARGES: A MESSY ISSUE UNDER BOTH SMCRA AND SCMRA

Pollution discharges from a mine site present particular problems in the framework of SMCRA and SCMRA reclamation bonding. Untreated pollution discharges have the potential to pollute nearby streams, impact in-stream aquatic environments for great distances, and threaten residential drinking water supplies by polluting groundwater sources.⁷⁸ Important issues have arisen during SMCRA's and SCMRA's tenure over how bonding under these two statutory schemes can be effective on sites featuring pollution discharges. The primary issue is how can the regulatory authority ensure that the public will not have to improperly bear the burden of treating pollution discharges if the permittee's permit is revoked and the bond associated with that revoked permit is forfeited prior to the termination of the discharge? As OSM has noted, "SMCRA provides no authorization for the transfer of post-mining treatment expenses from the permittee to society at large."⁷⁹

A. *Denial of a Permit Whenever a Post-Mining Pollution Discharge is Predicted*

It is very difficult to predict with precision or accuracy how long a mine pollution discharge will last and how much it will cost to remedy that discharge. Given these problems and given the interest in minimizing harm to the environment from post-mining pollution discharges, the DEP has responded by simply

⁷⁶ See *id.* See generally W. VA. CODE ST. R. § 38-2-11(11.5) (2004) (outlining a complicated bond matrix that DEP applies to determine the size of per acre bonds).

⁷⁷ See West Virginia Regulatory Program, 66 FED. REG. 67,446, 67,447-48 (Dec. 28, 2001).

⁷⁸ See Courtney W. Shea, *Regulating for the Long Term: SMCRA and Acid Mine Drainage*, 10 J. NAT. RES. & ENVT. L. 193, 193-194 (1995).

⁷⁹ OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR, HYDROLOGIC BALANCE PROTECTION POLICY GOALS AND OBJECTIVES ON CORRECTING, PREVENTING AND CONTROLLING ACID/TOXIC MINE DRAINAGE (1996) [hereinafter HYDROLOGIC BALANCE PROTECTION], available at <http://www.osmre.gov/amdpol.txt>.

denying permits whenever the permit application process reveals that a site will produce post-mining pollution discharges.⁸⁰ Denial of a permit which forecasts a future pollution discharge is the simplest and easiest way to ensure that the public will not have to improperly pay to treat pollution discharges following mining.

Denying a mining permit whenever the mine to be permitted is predicted to produce a pollution discharge is supported by Section 515(b)(10) of SMCRA, which provides that each surface mine must

[m]inimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by (A) avoiding acid or other toxic mine drainage by such measures as, but not limited to (i) preventing or removing water from contact with toxic producing deposits; (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses; (iii) casing, sealing, or otherwise managing bore holes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters.⁸¹

Section 516(b)(9) of SMCRA requires, with respect to underground mines, compliance with substantially the same hydrologic protection requirements as section 515(b)(10).⁸²

In *Riith Energy, Inc., v. OSM*,⁸³ the Interior Board of Land Appeals recognized that OSM is required to avoid acid or other toxic mine drainage under 30 U.S.C. § 1265(b)(10)(A) and 30 C.F.R. § 816.41(f) so as to minimize disturbance to the prevailing hydrologic balance.⁸⁴ “Minimizing the contact of water and toxic-producing deposits, as argued by the petitioner, is not the standard.”⁸⁵

⁸⁰ See, e.g., *Consolidation Coal Co. v. Callaghan*, W. Va. Surface Mining Board, App. No. 02-20-SMB (Sept. 2002). Fortunately, knowing, prior to permit issuance, whether a pollution discharge will be created during mining has been made easier over the years. In 1977, West Virginia constituted an AMD task force to assist in this effort. This task force, comprised of representatives from government, academia, the environmentalist movement, engineering consultants, and industry drafted and published a blueprint, titled *Suggested Guidelines for Methods of Operation in Surface Mining Areas of Areas With Potentially Acid Producing Materials* in May of 1978 which identified all methods known at that time for how to control or prevent AMD on surface mining operations. Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 8. Many of these methods were subsequently adopted by industry. *Id.*

⁸¹ 30 U.S.C. § 1265(b)(10) (2000).

⁸² *Id.* at § 1266(b)(9).

⁸³ 111 I.B.L.A. 239 (1989).

⁸⁴ *Id.* at 249.

OSM's policies and reports generally mirror the *Rith Energy* court's findings. As a general rule, OSM's policies suggest that a permit should not be issued whenever the permit application forecasts future pollution discharges from the permitted area.⁸⁶ Over the years, OSM has released two "draft" reports and one set of comments that address this issue.⁸⁷ OSM's 1997 comments, memorialized in a document titled "Hydrologic Balance Protection Policy Goals and Objectives on Correcting, Preventing Acid/Toxic Mine Drainage," lists one of the objectives of the permitting process as preventing off-site material damage to the hydrologic balance and minimizing both on- and off-site disturbances to the hydrologic balance.⁸⁸ According to OSM's 1997 comments, "[I]n no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a post-mining polluttional discharge that would require long-term treatment without a defined endpoint."⁸⁹

In accord with OSM's stated policy, when a proposed permit in West Virginia is projected to produce future pollution discharges, DEP analyzes the permit to see whether the proposed mining operation will create "material damage" to the hydrologic balance outside of the permit area.⁹⁰ According to DEP's Regulation, "[M]aterial damage to the hydrologic balance outside the permit areas means any long-term or permanent change in the hydrologic balance caused by surface mining operation(s) which has a significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses."⁹¹ While the coal industry and its advocates argue that perpetual treatment is an acceptable method of meeting SMCRA's requirement for compliance with the Clean Water Act and prevention of material damage to the hydrologic balance off of the permit area,⁹² DEP has normally disagreed with this argument.⁹³ Typically, if DEP finds that a permit forecasts future pollution dis-

⁸⁵ *Id.*

⁸⁶ HYDROLOGIC BALANCE PROTECTION, *supra* note 79.

⁸⁷ OSM's first "draft" report was issued in 1984 (on file with author). OSM issued a second "draft" report in 1993 (on file with author). In 1997, OSM issued comments (i.e. clarifications) concerning its second draft report. *See id.*

⁸⁸ *Id.*

⁸⁹ *Id.* In its 1997 comments, which responded to a 1996 Draft of its AMD Policy, OSM stated that "the [AMD] policy prohibits the approval of surface coal mining operations that would result in the creation of post-mining (sic) AMD requiring perpetual treatment." *Id.* "OSM believes that such operations do not constitute reclamation as envisioned under SMCRA." *Id.*

⁹⁰ W. VA. CODE ST. R. § 38-2-3(3.22.e) (2004).

⁹¹ *Id.*

⁹² *See* Shea, *supra* note 78, at 200.

⁹³ *See id.* at 199 n.30 (citing *McElroy Coal Co. v. Callaghan*, W. Va. Surface Mining Board,

charges that would migrate offsite without treatment, the to-be permitted facility will necessarily violate the hydrologic balance protection provisions of 38 CSR § 2-14.5 and the permit will not be issued.⁹⁴ In 1994, DEP denied a permit to McElroy Coal Company for the construction of a refuse pile because the refuse pile was projected to cause AMD for decades, and perhaps even centuries.⁹⁵ This permit denial was upheld by the West Virginia Surface Mine Board, which held that West Virginia law "requires [DEP] to apply performance standards to operators in order to avoid AMD."⁹⁶

In 1999, CONSOL Energy submitted a permit application to DEP which asked DEP to allow it to dispose of coal refuse in a new disposal facility, referred to as Cunningham Hollow, in Marshall County, West Virginia.⁹⁷ CONSOL's permit application predicted that without treatment, capping, or the use of alternative treatment technologies, the Cunningham Hollow refuse area would begin to discharge polluted water and continue to do so for an indefinite period of time.⁹⁸ In 2001, DEP sent a letter to CONSOL informing CONSOL that DEP "would not issue a permit that allowed the creation of acidic discharges which would require indefinite treatment at Cunningham Hollow and advised CONSOL that DEP would require CONSOL to prevent the formation of AMD by the use of an alkaline amendment."⁹⁹ "Subsequently, CONSOL amended the probable hydrologic consequences statement, hydrologic reclamation plan, and other hydrologic portions of its permit application to provide for addition of alkaline material to its refuse stream."¹⁰⁰ The addition of alkaline material was designed to prevent pollution discharges from forming, not just to treat those discharges after they formed.

App. No. 94-56-SMB (Feb. 11, 1995)); *see also* Consolidation Coal Co. v. Callaghan, W. Va. Surface Mine Board, App. No. 02-20-SMB (Sept. 2002).

⁹⁴ *See* McElroy Coal Co. v. Callaghan, W. Va. Surface Mining Bd., App. No. 94-56-SMB (Feb. 11, 1995).

⁹⁵ *See id.*

⁹⁶ *Id.*

⁹⁷ Consolidation Coal Co. v. Callaghan, W. Va. Surface Mine Board, App. No. 02-20-SMB (Sept. 2002).

⁹⁸ *Id.*

⁹⁹ *Id.* "Alkaline amendment" is the addition of alkaline materials to an acidic pollutional discharge. OFFICE OF SURFACE MINING, U.S. DEP'T OF INTERIOR, ACID MINE DRAINAGE PREVENTION AND MITIGATION TECHNIQUES, *available at* <http://www.osmre.gov/amdpvm.htm>. The addition of alkaline materials to the acidic discharge tends to neutralize the discharge and can cause certain metals to precipitate out of solution, thereby making the pollutional discharge less pollutional. *Id.*

¹⁰⁰ Consolidation Coal Co. v. Callaghan, W. Va. Surface Mine Board, App. No. 02-20-SMB (Sept. 2002).

In a September 2002 order reviewing this proposed permit, the West Virginia Surface Mine Board noted that

[a]n applicant for a permit has the burden to affirmatively demonstrate that reclamation can be accomplished. Completion of reclamation includes meeting effluent limits and water quality standards and obtaining [final] bond release. To obtain final bond release, the drainage from a site must meet effluent limits without chemical treatment. Chemical treatment includes [both active and] passive forms of chemical treatment. However, 'chemical treatment' does not include 'measures approved in the permit and taken during mining and reclamation to prevent the formation of acid mine drainage.' Where there is potential for acid mine drainage, alkaline amendment may be one such measure.¹⁰¹

Thus, the Surface Mine Board found that if pollution discharges were prevented, through alkaline amendment, the permit could be issued. However, if pollution discharges requiring treatment are forecast in the permit application, that permit application, or permit revision, must normally be denied.¹⁰²

B. An Exception to the Rule: Allowing Permit and Bonding Revisions When Long Term Pollution Discharges Are Forecast

While it is proper under the law for a regulatory authority to deny permits forecasting future post-mining pollution discharges that require ongoing treatment, OSM has opened the door for a limited exception to practice. According to OSM, under certain circumstances, a regulatory authority can issue a permit revision, though not an initial permit, to a mining permittee even when mining under that permit revision is predicted to cause future pollution discharges.¹⁰³ In a letter to DEP dated October 28, 1999, OSM indicated that if DEP found that increases in already existing pollution discharges from a proposed CONSOL Shoemaker mine permit revision would not violate the hydrologic balance protection provisions of 38 CSR § 2-14.5 which require the prevention of material damage to the environment outside of the permit area, OSM would not consider a decision by DEP to issue that permit revision to be arbi-

¹⁰¹ *Id.* (citations omitted).

¹⁰² *See* W. Va. Mining & Reclamation Ass'n v. Babbitt, 970 F. Supp. 506 (S.D. W. Va. 1997).

¹⁰³ *See* Letter from Roger Calhoun, Director, Charleston Field Office, Office of Surface Mining, to Harold M. "Rocky" Parsons, Jr., Office of Mining and Reclamation, West Virginia Division of Environmental Protection (Oct. 28, 1999) (on file with author).

trary, capricious, or an abuse of discretion.¹⁰⁴ In other words, if DEP thought it was acceptable to issue that permit revision, so would OSM.

OSM's position with respect to the CONSOL mine is significant in that it modifies OSM's previously stated policy which allowed permit revisions to be issued only when the "discharge has a known endpoint and . . . the applicant also posts adequate financial assurance to cover estimated treatment costs for the life of the discharge."¹⁰⁵ The CONSOL operation did not predict an end date to the treatment of pollution discharges, noting merely that "water pumping and treatment would commence and continue until no longer needed for water quality purposes."¹⁰⁶

In its letter to DEP dated October 28, 1999, OSM gave DEP six reasons why it thought a decision by DEP to issue a permit revision to the Shoemaker Mine, which contemplated increased pollution discharges from the level allowed by then-permitted conditions, would be acceptable: (1) without the permit issuance, "there would still be pollutional discharge at the same location;" (2) with the permit revision, there would be an increase of seventy-five gallons per minute in the amount of water to be treated; however, this increase would still be "well within [CONSOL's] current proven ability to treat [water];" (3) the expected discharge point of future pollution discharges "has not been changed to a location that might be sensitive to 'treated water;'" (4) mine expansion under the proposed permit would "not [be] expected to cause new locations of pollutional discharge points;" (5) the additional polluted water that would be discharged as a result of the permit revision would not require a change in treatment technologies already being used on site; and (6) CONSOL would have in place an adequate financial mechanism to ensure the perpetual treatment of AMD after mining of the site had been completed.¹⁰⁷ This last requirement addresses the need for sufficient funds in West Virginia's SRF to pay for the reclamation and perhaps perpetual water treatment costs of a site featuring pollution discharges when mining ceases.

CONSOL's financial assurance mechanism would not be adequate, at least according to OSM, unless it provided enough money to ensure that all costs of reclamation and treatment would be paid if the State of West Virginia was required to take over the reclamation and treatment of the CONSOL site.¹⁰⁸

¹⁰⁴ See *id.* In overseeing programs which have achieved primacy over the regulation of mining within their borders, such as West Virginia, OSM will reverse a decision of the state organization, here DEP, which implements that state's primacy program, only if OSM finds DEP's decision to be "arbitrary, capricious, or an abuse of discretion." 30 C.F.R. § 842.11(b)(2) (2004).

¹⁰⁵ HYDROLOGIC BALANCE PROTECTION, *supra* note 79, at cmt. 13.

¹⁰⁶ Letter from Gary E. Slagel, Director, Regulatory Affairs, CONSOL Energy, to Michael C. Castle, Director, West Virginia Division of Environmental Protection (May 22, 2000) (on file with author).

¹⁰⁷ Letter from Roger Calhoun to Harold M. "Rocky" Parsons, Jr., *supra* note 103.

¹⁰⁸ *Id.*

Reclamation and treatment costs would include the acquisition of land and right of ways, the construction of treatment facilities, and the operation of those facilities, including the payment of expenses associated with offsite sludge disposal.¹⁰⁹

C. *Bonding on Permits Where a Post-Mining Pollution Discharge Was Not Predicted Prior to the Commencement of Mining*

The problem of how to assure payment of post-mining treatment costs raised by the situation at CONSOL's Shoemaker Mine is not simply confined to that mine. While regulatory agencies normally do not issue permits which forecast the future, post-mining pollution discharges and the percentage of permits resulting in post-mining pollution discharges have decreased in some states over the years due to improvements in the permitting process.¹¹⁰ Post-mining pollution discharges still occur in many instances when no such discharges were predicted prior to mining. Whenever discharges that violate legal discharge limits appear during mining, those discharges must often be treated to meet legal water quality limitations for many years, often even decades, following the completion of mining.¹¹¹

A regulatory agency assures the mining entity's payment of these treatment costs through SMCRA and SCMRA bonding schemes in two ways.

1. *Adjusting Bonding Requirements Under SMCRA's Traditional Bonding Scheme*

In the past, the federal bonding system implementing the bonding scheme of Section 509(a) of SMCRA had been criticized by federal officials for not requiring appropriate reclamation bonds for sites featuring long-term pollution discharges.¹¹² According to OSM's current Director, prior to recent actions in Tennessee,¹¹³ the federal system only required a bond large enough to pay for one-time reclamation costs such as leveling highwalls, covering mined areas with dirt, and hydroseeding the unreclaimed site in an effort to establish ground

¹⁰⁹ *Id.*

¹¹⁰ See Shea, *supra* note 78, at 201.

¹¹¹ See, for example, Ingram v. Dep't of Envtl. Res., 595 A.2d 733, 736-37 (Pa. Commw. Ct. 1991), where a mine discharged acid water for 12 years before the compliance order in question and continued to discharge at the time of the decision.

¹¹² See Brian Bowling, *Agency Examines Its Bond System; Notice Seeks Input On How to Handle Mining System*, CHARLESTON DAILY MAIL, May 17, 2002, at 7D, available at LEXIS, News Library, Charleston Daily Mail File.

¹¹³ See *infra* notes 118-25 and accompanying text.

cover on the site.¹¹⁴ “When it comes to long-term problems such as [fixing] acid-mine drainage, the bond money runs out before the problem is fixed.”¹¹⁵

OSM has recently responded to the problem of under-bonding on sites featuring pollution discharges by relying on the provisions of Section 509(e) of SMCRA to require increases in reclamation bond amounts. As provided for by Section 509(e) of SMCRA, the amount of a reclamation bond “shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.”¹¹⁶ OSM has stated that “if an unanticipated [water] treatment need arises, the regulatory authority has an obligation to order an increase in the minimum [conventional] bond required for [a mining] site” and that the minimum amount of the revised conventional bond for the site “must be adequate to cover all foreseeable treatment costs.”¹¹⁷

Since May 2000, OSM has attempted to implement in Tennessee its policy requiring bond adjustment. On May 30, 2000, OSM’s Knoxville, Tennessee, Field Office issued “Field Office Policy Memorandum Number 37,” a “Policy for Requiring Bond Adjustment on Permitted Sites Requiring Long-Term Treatment of Pollutational Discharges.”¹¹⁸ This policy requires a permittee to adjust the amount of the SMCRA Section 509(a) reclamation bond to fully cover the present and future costs of treating pollution discharges emanating from the site.¹¹⁹

Field Office Policy Memorandum #37 provides that when there is unanticipated AMD, the permittee for that site is required to revise its permit to include an AMD treatment plan.¹²⁰ During the approval process for the AMD treatment plan, Field Office Policy Memorandum #37 also requires the permittee to submit capital costs for replacement of the treatment system as well as annual maintenance costs.¹²¹ The cost information is then used by OSM to calculate an adjustment to the reclamation bond.¹²² The Policy Memorandum provides that total costs for long term treatment (to be used in calculation of the bond amount) is based on: (1) the present value of capital costs to replace the

¹¹⁴ See Bowling, *supra* note 112, at 7D.

¹¹⁵ *Id.*

¹¹⁶ 30 U.S.C. § 1259(e) (2000).

¹¹⁷ West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,902 (Oct. 5, 1995).

¹¹⁸ U. S. Dep’t of the Interior, Office of Surface Mining, Knoxville Field Office, Field Office Policy Memorandum No. 37, issued by George C. Miller, Director, Knoxville Field Office, May 30, 2000 (on file with author).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

facility, (2) the present value of annual maintenance and operation costs, (3) an inflation factor, and (4) a seventy-five year performance period, or a shorter time if the permittee can demonstrate that the AMD will be abated without treatment in less than seventy-five years.¹²³ Once the costs for performing the treatment for seventy-five years are calculated, OSM adjusts the permittee's reclamation bond to cover those costs.¹²⁴

In accordance with Field Office Policy Memorandum #37, OSM's Knoxville Field Office has issued several orders to mining operators requiring them to adjust their bonds to cover the present and future water treatment costs associated with the un-forecasted pollution discharges. These orders have required permittees to increase the amount of their bonds from the level of thousands of dollars to, in some cases, over a million dollars to meet the requirements of OSM's policy. For example, OSM's Knoxville Field Office required Tennessee Consolidated Coal Company to increase its reclamation bond from \$186,000 to \$9,060,800 to cover the future costs of treating pollution discharges that OSM would have to bear if Tennessee Consolidated abandoned Daus Mountain Strip Mines #2 and #49.¹²⁵

The various permittees to whom OSM's orders have been issued have administratively challenged the orders and these challenges remain tied up in court at the moment. The National Mining Association has also challenged OSM's overall policy in a separate court proceeding, claiming, *inter alia*, that the performance bonds required under OSM's Policy Memorandum, applicable for a seventy-five year performance period, are essentially impossible for mine operators to obtain.¹²⁶

The National Mining Association's challenge raises a prescient issue: a permittee may have difficulty in increasing the amount of the reclamation bond upon the advent of unpredicted pollution discharges. If the mining entity has limited financial resources, it may have difficulty in posting a cash escrow or other self insurance mechanism which would permit it to fulfill the regulatory authority's increased bonding requirements. The mining entity may at the same time be unable to convince a third party surety to issue it an increased reclamation bond, especially when the company has little or no collateral in which the surety can take a security interest. OSM itself has recognized that the amount of financial assurance needed to pay for treatment of post-mining pollution discharges "may be substantial."¹²⁷

¹²³ *Id.*

¹²⁴ *Id.* OSM's Policy Memorandum also provides that the permittee may use a sinking fund in lieu of the bonding methods provided in the regulations to fund excess reclamation costs. *Id.*

¹²⁵ U. S. Dep't of Interior, Office of Surface Mining Order Issued to Mr. Bernard Higgins, Property Manager, Tennessee Consolidated Coal Company, June 22, 2000 (on file with author).

¹²⁶ See Complaint filed in Nat'l Mining Ass'n v. Babbitt - No. 00-0549, E. D. Tenn. District Court, October 2, 2002 (on file with author).

¹²⁷ HYDROLOGIC BALANCE PROTECTION, *supra* note 79, at cmt. 17.

Another problem with requiring an increase in the amount of the reclamation bond upon the advent of pollution discharges is difficulty determining with precision how long the pollution discharge will last and how long treatment costs will have to be paid following the completion of mining. Not knowing these two factors makes it difficult to assess how much the present day value of the reclamation bond should be increased to assure that present and future treatment and other reclamation costs will be paid.

A third problem relating to bond adjustments is that pollution discharges from a mine may not even begin until several years after mining has been completed and regulatory jurisdiction over a site may have already terminated. For example, in a May 22, 2000 letter to then-DEP Director Michael Castle, CONSOL Coal Company projected that once its underground Shoemaker Mine in northern West Virginia closed, the mine would flood and would produce AMD as a result of this flooding.¹²⁸ However, CONSOL predicted that it would take 106 years before this AMD discharged.¹²⁹ After the mine floods in 106 years, CONSOL promised that "water pumping and treatment would commence and continue until no longer needed for water quality purposes."¹³⁰

Fortunately, in the CONSOL case, future pollution discharges were predicted before bond release was granted. This has allowed financial assurance mechanisms to be established, which will pay for the treatment of future pollution discharges emanating from the Shoemaker Mine. Unfortunately, the public may not be so fortunate with respect to a coal company's payment of pollution treatment costs at other mining sites. Without an Alternative Bonding System, a trust fund, or some other alternative financial assurance mechanism previously funded by coal permittees, the public may be forced to pay for unpredicted water treatment that begins at a mining site long after the mining entity and its principals have disappeared.

2. Assuring the Payment of Increased Reclamation Costs in an Alternative Bonding System

Adjustments in Alternative Bonding System contributions after increased reclamation costs are confirmed is also appropriate. An Alternative Bonding System, must "provide for [the complete] abatement or treatment of pollutional discharges emanating from permanent program bond forfeiture sites, unless the approved program includes some other form of financial guarantee" which will serve to fund all outstanding reclamation, including water reclamation liabilities.¹³¹ If contributions made to an Alternative Bonding System are

¹²⁸ Letter from Gary E. Slagel to Michael C. Castle, *supra* note 106.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Letter from W. Hord Tipton, Deputy Director, Operations and Technical Services, Office of Surface Mining, to E.W. Wayland, Commissioner, West Virginia Division of Energy (Oct. 1,

increased, these contributions will serve to fund the increased present and future costs of reclamation associated with bond forfeiture sites featuring pollution discharges. The Alternative Bonding System can pay for the complete abatement or treatment of pollution discharges in one of many different ways. For example, if the Alternative Bonding System has a tax, the tax can be increased to cover the additional projected costs associated with abating and treating pollution discharges from present and future forfeited bond sites.¹³² If the Alternative Bonding System features some type of bonding requirement, "[t]he cost of water treatment at future bond forfeiture sites may be addressed . . . by adjusting site-specific bonds for water treatment where necessary, or by implementing [an] environmental security account"¹³³

West Virginia has not yet developed a formula to determine how much a permittee's reclamation bond or contributions into its Alternative Bonding System should be adjusted whenever an unplanned pollution discharge arises. However, DEP has had experience in remediating and paying for the remediation of pollution discharges at unreclaimed mine sites through its Special Reclamation Program. West Virginia's first foray into paying for the remediation of pollution discharges from mine sites occurred at the DLM site in Alton, Upshur County, West Virginia.¹³⁴ In 1985, DLM Coal Company conveyed to West Virginia all of its assets, including all of its mining interests, its real estate, and its personal property (including mining equipment, machinery, cash, etc.) in exchange for the State's promise to take over DLM's treatment of pollution discharges at its Alton site.¹³⁵ Since 1992, DEP has continued to treat pollution discharges emanating from the Alton site. Annual expenditures on the site have ranged from \$177,239.93 on initial startup to \$501,807.53 during the 1996-1997 fiscal year.¹³⁶ The total amount spent by DEP on the Alton site reclamation since 1992 continues to increase; from 1992 when DEP starting treating water at

1991) (on file with author).

¹³² See West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,902 (Oct. 4, 1995).

¹³³ *Id.* A West Virginia Regulation authorizes DEP to develop regulations which would require the creation of environmental security accounts. See W. VA. CODE ST. R. § 38-2-11(11.6) (2004). DEP has never developed these regulations; however, the West Virginia Surface Mine Board (including its predecessor the Reclamation Board of Review) has required the creation of an environmental security account at three different operations throughout West Virginia. Letter from Roger Calhoun, Director, Charleston Field Office, Office of Surface Mining, to Michael C. Castle, Director, Division of Environmental Protection (September 3, 1999) (on file with author) (containing an attachment describing these three environmental security accounts).

¹³⁴ Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 12-13.

¹³⁵ *Id.*

¹³⁶ Information provided to author by Thomas McCarthy, Office of Special Reclamation, West Virginia Department of Environmental Protection (on file with author).

the Alton site until October 13, 2004, DEP spent \$7,029,102.18 to treat pollutional discharges coming from DLM's former permits.¹³⁷

Since DEP began treating pollution discharges from DLM's permits, it has also begun treating pollution discharges from other sites. In the early 1990s, DEP took over chemically treating AMD from the F&M Coal Company bond forfeiture site in Preston County, West Virginia.¹³⁸ If left untreated, AMD from this site would have endangered the Little Sandy Creek and the backwaters of Tygart Lake.¹³⁹ At the time DEP took over treatment of the F&M site, the pH of the pollution discharge, a measure of acidity, was 2.7.¹⁴⁰ At the former T&T and Omega sites, water treatment began in 1993 and 1994, respectively, and has continued to this day.¹⁴¹ Yearly reclamation and treatment costs at the DLM, F&M, T&T, and Omega sites have run into the hundreds of thousands of dollars.¹⁴² Between 1997 and 2001 alone, DEP spent \$6,169,134.66 for water treatment at those four sites.¹⁴³

Yet the cost of treating pollutional discharges from those four sites represent just a small fraction of the amount of money DEP has spent and that it will have to spend to treat pollutional discharges at all of its forfeited mine sites over many years.¹⁴⁴ On June 18, 2001, DEP related that it had 128 permits requiring acid mine drainage (pollutional discharge) treatment.¹⁴⁵ DEP was able to treat water on only 15 of those permits due to funding inadequacies in the

¹³⁷ *Id.*

¹³⁸ Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 15-16.

¹³⁹ *Id.*

¹⁴⁰ *Preston Mine Owners Fight State Order*, CHARLESTON DAILY MAIL, Sept. 28, 1992 (on file with author). The higher the pH, the lower the acidity of a sample. For example, water has a pH of approximately 7.0. Vinegar, an acid, has a pH of approximately 3.0. Depending on the volume of flow associated with a pH of 2.7, a pH of 2.7 could have dramatic, and devastating, effects on the environment.

¹⁴¹ The T&T and Omega sites are located, respectively, in Preston County and Monongalia County.

¹⁴² Annual Water Treatment Cost Data Maintained by the West Virginia Department of Environmental Protection's Office of Special Reclamation for the years 1997-2001 (on file with author).

¹⁴³ *Id.*

¹⁴⁴ Special Reclamation Program statistics as of June 18, 2001 as maintained by the Office of Special Reclamation for the West Virginia Department of Environmental Protection. (on file with author); Letter from Michael Castle, Director, West Virginia Department of Environmental Protection, to Allen Klein, Regional Director, U.S. Department of the Interior, Office of Surface Mining and Reclamation (Aug. 31, 2000) (on file with author).

¹⁴⁵ Special Reclamation Program statistics as of June 18, 2001 as maintained by the Office of Special Reclamation for the West Virginia Department of Environmental Protection. (on file with author).

SRF.¹⁴⁶ If DEP had been able to fully treat water on all 128 permits at that time, DEP's annual cost of water treatment would have equaled \$5,764,256 and its one time cost to construct permanent water treatment systems necessary for those permits would have been \$16,136,170.¹⁴⁷ Importantly, those figures did not include the \$25,002,134 DEP needed to perform "land only" reclamation on its bond forfeited permits.¹⁴⁸ Yet even if the costs to perform "land only" reclamation were subtracted from DEP's 2001 reclamation responsibilities, the cost to DEP of performing only water reclamation on its bond forfeited sites in 2001 exceeded the \$12,185,747 balance DEP had in its SRF at that time.¹⁴⁹

D. Permit and Bond Release When A Permitted Area Features Existing Pollution Discharges

Another issue that arises when continuing pollution discharges are present on a permit following the completion of mining is whether the permit and reclamation bond for the site may be released given these continuing pollution discharges. Section 519(c)(3) of SMCRA provides that no bond shall be fully released until all the reclamation requirements of SMCRA have been fully met.¹⁵⁰

Reclamation, which must be fully met before bond release may be granted, "include[s] the abatement of surface and ground water pollution resulting from the operation."¹⁵¹ OSM has stated that a reclamation bond may not be released where active or passive treatment systems are being used to achieve compliance with applicable effluent limitations.¹⁵² Federal court decisions have adopted this position.¹⁵³ However, OSM has also established an exception to this position by stating that "the regulatory authority may release the bond and

¹⁴⁶ *Id.* Telephone interview with Charlie Miller, Special Reclamation Office, West Virginia Department of Environmental Protection (Jan. 8, 2003).

¹⁴⁷ Special Reclamation Program statistics as of June 18, 2001 as maintained by the Office of Special Reclamation for the West Virginia Department of Environmental Protection. (on file with author).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 30 U.S.C. § 1269(c) (2000).

¹⁵¹ Letter from W. Hord Tipton to E.W. Wayland, *supra* note 131; *see also* West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,902 (Oct. 4, 1995).

¹⁵² *See* West Virginia Regulatory Program, 61 Fed. Reg. 6511, 6517 (Feb. 21, 1996). A wet-land treatment system is one example of a passive water treatment system. *See* CHRISTINE STEIN-KOENIG, OFFICE OF SURFACE MINING, U.S. DEP'T OF THE INTERIOR COALEX REPORT 111, *available at* <http://www.osmre.gov/coalex/coalex111.htm> (Nov. 1, 1999).

¹⁵³ *See* Am. Mining Cong. v. U.S. EPA, 965 F.2d 759, 768 (9th Cir. 1992); W. Va. Mining & Reclamation Ass'n. v. Babbitt, 970 F. Supp. 506 (S.D. W. Va. 1997).

terminate jurisdiction over a site with ongoing treatment needs . . . if an enforceable mechanism such as a contract or a trust fund of sufficient duration and with adequate resources exists to ensure that treatment continues once jurisdiction is terminated.”¹⁵⁴ In referencing the contract and trust fund, OSM “clearly envisions that these [financial] assurances will result in continued treatment or implementation of other remediation measures” after bond release has occurred.¹⁵⁵

The general rule of West Virginia’s SCMRA parallels the general rule of SMCRA and prohibits bond release whenever existing pollution discharges exist at the time bond release is sought.¹⁵⁶ SCMRA states that “no bond release or reduction will be granted if, at the time, water discharged from or affected by the operation requires chemical or passive treatment in order to comply with applicable effluent limitations or water quality standards.”¹⁵⁷ Like SMCRA, SCMRA also features an exception to this general rule, though under SCMRA, a permit may only be eligible for partial (i.e. Phase I) bond release when pollution discharges exist at the time that bond release is sought and the permittee has a financial assurance mechanism in place which will assure long term treatment of acid mine drainage.¹⁵⁸

VI. HISTORICAL INADEQUACIES IN WEST VIRGINIA’S BONDING PROGRAM

Over the past two decades, the issue of whether or how to permit and bond pollution discharges has not been the only issue faced by West Virginia’s Alternative Bonding System. Indeed, the fundamental adequacy of West Virginia’s Alternative Bonding System has been challenged. The issues of whether West Virginia’s Alternative Bonding System has been adequate under Section 509(c) of SMCRA and whether that system has achieved the objectives of the traditional bonding program established by Section 509(a) of SMCRA are issues

¹⁵⁴ West Virginia Regulatory Program, 60 Fed. Reg. at 51,902 (referring to 30 C.F.R. § 700.11(d) (2003)).

¹⁵⁵ HYDROLOGIC BALANCE PROTECTION, *supra* note 79, at cmt. 16.

¹⁵⁶ See W. VA. CODE ST. R. § 38-2-12(12.2.e) (2004).

¹⁵⁷ *Id.* In 1996, OSM required West Virginia to amend its SCMRA program to clarify that a reclamation bond may not be released where passive treatment systems are used to achieve compliance with applicable effluent limitations. West Virginia Regulatory Program, 61 Fed. Reg. 6511, 6517 (February 21, 1996). West Virginia Code of State Rules section 38-2-12(12.2.e) is the consequence of this required amendment. Section 38-2-12(12.2.e) clarifies what is and what is not passive treatment by stating that “measures approved in the permit and taken during mining and reclamation to prevent the formation of acid [mine] drainage shall not be considered passive treatment.” W. VA. CODE ST. R. § 38-2-12(12.2.e).

¹⁵⁸ See *id.* There are three phases of bond release under SCMRA: Phases I, II, and III. See *id.* The permittee becomes eligible for Phase I bond release first and may subsequently become eligible for Phase II and Phase III releases depending on his adherence to SMCRA’s performance standards. See *id.*

that have produced much administrative and legal wrangling over the past two decades.

The primary problems with the adequacy of West Virginia's Alternative Bonding System relate to the fact that West Virginia's bonding program has not been adequately funded to pay for the treatment of unpredicted pollution discharges emanating from a mining site, and the program has been hobbled by artificially imposed statutory restraints on receipts and expenditures.

Notwithstanding the removal of the conditions on West Virginia's alternative bonding and primacy programs in 1983, there were inherent problems in the structure of West Virginia's Alternative Bonding System from the program's very beginning. For example, under the statutes creating the Alternative Bonding System, West Virginia could spend unlimited amounts of money out of the SRF for general administrative purposes or for non-coal programs.¹⁵⁹ In OSM's opinion, DEP could have siphoned money off from the SRF to operate its other regulatory programs.¹⁶⁰ Such a practice could have bankrupted the SRF.¹⁶¹ In response to this problem, in 1992 West Virginia placed an expenditure cap on the SRF so that no more than 10% of the SRF could pay for DEP's administrative activities.¹⁶² This change to West Virginia's program was approved by OSM on October 4, 1995.¹⁶³

Yet, the primary problem with the West Virginia bonding program over the last twenty plus years has not been with the amount of expenditures that have been authorized from the SRF but rather with the amount of contributions the coal permittees have been required to make to the SRF. The two primary contributions that permittees make to the SRF include a per ton clean coal fee and a per acre bond permittees post whenever they initiate mining operations.¹⁶⁴ Each contribution has variously been too small in quantity over the past two decades.

In the mid 1980s, West Virginia required a bond for each mining operation at a rate of \$1,000 per acre (or fraction of an acre), with a minimum \$10,000 bond on the entire permit, as required by SMCRA.¹⁶⁵ Due to restrictions in the law, however, the balance in the SRF fluctuated between approximately one and two million dollars, collecting only a one cent per coal ton fee

¹⁵⁹ See Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 10.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² W. VA. CODE § 22A-3-11(g) (1993) (repealed in 1994 and recodified at W. VA. CODE § 22-3-11(g) (2004)).

¹⁶³ See West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,903 (Oct. 4, 1995).

¹⁶⁴ See W. VA. CODE § 22-3-11(a), (g) (2004).

¹⁶⁵ See MERRITT, *supra* note 66.

whenever the SRF's balance dropped below one million dollars.¹⁶⁶ In addition, this fee was collected only until "the end of the quarter in which the [SRF was] replenished to the two million dollar level."¹⁶⁷

In the mid 1980s, the federal government's General Accounting Office concluded that the reclamation bonds West Virginia was approving only paid 46 percent of the actual costs of reclamation following bond forfeiture.¹⁶⁸

"By 1988-89, [OSM] oversight evaluations indicated that [West Virginia's SRF] lacked sufficient revenue to reclaim all outstanding bond forfeiture sites."¹⁶⁹ One of the reasons for this problem was that West Virginia was assuming that it cost approximately \$1,000 an acre—or the amount companies posted in reclamation bonds—to clean up abandoned mines.¹⁷⁰ At the time, it actually cost West Virginia approximately \$2,000 an acre to reclaim an abandoned mine site.¹⁷¹ Another reason for this funding problem was that the cash balance in the SRF was too small because the SRF had stopped earning interest due to investment losses suffered by the State's Consolidated Investment Fund.¹⁷² In the early 1990s, OSM and DEP jointly determined that the liabilities of the SRF exceeded the SRF's assets by at least \$6.2 million.¹⁷³

In 1990, the West Virginia State Legislature began responding to these problems in the SRF.¹⁷⁴ On March 10, 1990, House Bill 4735 went into effect, raising the per ton coal tax from one cent to three cents.¹⁷⁵

During the 1991 legislative session, the West Virginia Legislature created West Virginia Code section 22A-3-11(a).¹⁷⁶ West Virginia Code section

¹⁶⁶ See *id.*

¹⁶⁷ *Id.*

¹⁶⁸ See L. Thomas Galloway & Thomas J. Fitzgerald, *The Bonding Program Under the 1977 Surface Mining Control and Reclamation Act: Chaos in the Coalfields*, 89 W. VA. L. REV. 675, 680 (1987).

¹⁶⁹ West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,446 (Dec. 28, 2001).

¹⁷⁰ See Ken Ward, Jr., *Greenbrier Mine Closure Highlights Cleanup Fund's Woes State Doesn't Have Reclamation Money*, THE SUNDAY GAZETTE-MAIL (Charleston, W. Va.), May 30, 1999, at 3A.

¹⁷¹ See *id.*

¹⁷² See West Virginia Regulatory Program, 66 Fed. Reg. at 67,446.

¹⁷³ Letter from W. Hord Tipton to E.W. Wayland, *supra* note 131.

¹⁷⁴ Letter from David C. Callaghan, Director, West Virginia Division of Environmental Protection, to James C. Blankenship, Jr., Director, Charleston Field Office, Office of Surface Mining, Reclamation and Enforcement (May 8, 1995) (on file with author).

¹⁷⁵ *Id.* House Bill 4735 was codified at West Virginia Code section 22A-3-11(g). W. VA. CODE § 22A-3-11(g) (later repealed and recodified at W. Va. Code § 22-3-11(h)).

¹⁷⁶ See W. VA. CODE § 22A-3-11(a) (1993) (repealed in 1994 and recodified at W. VA. CODE § 22-3-11(a)).

22A-3-11(a) provided for the development of site-specific bonding regulations and also raised the upper limit on per acre bonding from a maximum of one thousand dollars per acre to a maximum of five thousand dollars per acre.¹⁷⁷ Yet, despite the enactment of West Virginia Code section 22A-3-11(a) and the increased tax provided for by West Virginia Code section 22A-3-11(g), West Virginia's bonding program remained inadequate. On October 1, 1991, OSM notified West Virginia, pursuant to 30 C.F.R. § 732.17(c) and (e), that West Virginia must amend its primacy program because the SRF no longer met the requirements of 30 C.F.R. § 800.11(e).¹⁷⁸ OSM threatened to take over West Virginia's Special Reclamation Program if West Virginia did not amend its mining regulatory program in a fashion that would establish the financial adequacy of the SRF.¹⁷⁹ Additionally, OSM also requested that West Virginia perform an actuarial study to assure that West Virginia's Alternative Bonding System would be sufficient to fund reclamation at future bond forfeited sites.¹⁸⁰

If OSM had taken over the West Virginia Special Reclamation Program in 1991, several changes to the program would have occurred. First, state regulations and statutory provisions would have been replaced by federal provisions.¹⁸¹ "Enforcement activities under a federal program would [have] utilize[d] federal civil penalty provisions and the federal procedures for administrative and judicial review."¹⁸² If West Virginia retained control of the administration of its AML reclamation program while ceding control of its Special Reclamation Program to OSM, West Virginia would have lost as much as \$25 million per year in AML reclamation funds for the administration of its AML reclamation program.¹⁸³ Also, the State would have lost about \$1.3 million annually in permitting fees and civil penalties, and the cost to coal companies for new permits issued under the federal bonding program would have been about 4.5 times the amount that coal companies were paying for permits under West Virginia's regulatory program.¹⁸⁴ In addition, federal officials would have reviewed all the mining permits that the State had issued for existing permits and it would have taken twelve to eighteen months after the time of OSM's program takeover be-

¹⁷⁷ *Id.*

¹⁷⁸ See West Virginia Regulatory Program, 66 Fed. Reg. at 67,446. When taking into account money that the SRF would have to spend on treating pollution discharges emanating from bond forfeited sites, this number was likely much larger.

¹⁷⁹ See *Reclamation Fund's Use Halted*, CHARLESTON DAILY MAIL, April 10, 1991, at 10A.

¹⁸⁰ Letter from W. Hord Tipton to E.W. Wayland, *supra* note 131.

¹⁸¹ See *Reclamation Fund's Use Halted*, *supra* note 179, at 10A.

¹⁸² *Id.*

¹⁸³ See Daniel Bice, *Officials Outline Drawbacks To Losing Mine Control*, CHARLESTON DAILY MAIL, Aug. 1, 1991, at 4A.

¹⁸⁴ See *id.*

fore OSM would issue any new mining permits.¹⁸⁵ Finally, each operator would have had to purchase reclamation bonds that cost between \$4,500 to \$6,000 per acre: a significant increase over the size of the bonds that the operators were being required to purchase under West Virginia's law at the time.¹⁸⁶

In response to OSM's October 1, 1991 letter, the threatened federal takeover of West Virginia's mining regulatory program, and subsequent legislative efforts by DEP, further changes were made to West Virginia's Alternative Bonding System bonding program in 1992 and 1993. Specifically, the Legislature: (1) required DEP to develop a planning process and prioritization procedure to determine the most cost-effective way to complete reclamation of sites whose bond had been forfeited, (2) required that interest generated by the SRF be returned to the SRF, (3) provided that the SRF could spend up to twenty-five percent of its annual income on the treatment of pollution discharges from bond forfeited sites, (4) limited the amount of the SRF that DEP could use to pay for administrative expenses to ten percent per annum, (5) raised the special reclamation tax from one cent to three cents per ton of clean coal mined, (6) provided for the continuation of the special reclamation tax as long as the liabilities of the SRF exceeded the SRF's assets, (7) adopted site specific bonding regulations allowing for the use of incremental bonding and open acre bonding, (8) required operators to post penal, not performance bonds, (8) commissioned the study of the feasibility of an environmental security account for water quality, and (9) required DEP to develop a report to be filed with the Legislature detailing how these legislative changes were to be implemented.¹⁸⁷

In response to OSM's mandate in 1991 requiring DEP to perform an actuarial study on the financial health of its SRF, DEP commissioned the financial accounting firm of Deloitte and Touche to complete this task.¹⁸⁸ This report, titled "Actuarial Study for West Virginia Special Reclamation Fund," was completed and issued to DEP in March 1993; the report concluded that while the SRF had an "accrual deficit position as of June 30, 1992," the financial solvency of the SRF would realize gradual improvement between 1992 and 1997.¹⁸⁹ The report also predicted that the SRF would remain solvent for at least ten years.¹⁹⁰

There were, however, inherent problems in this actuarial study. The study did not contemplate the SRF's "potential liability [from] specific cases where environmental liability relating to water contamination, acid-mine drain-

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See W. VA. CODE § 22A-3-11(g) (1993) (repealed 1994); see also Interoffice Memorandum from Roger T. Hall to Dennis Boyles, *supra* note 5, at 14.

¹⁸⁸ See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,446 (Dec. 28, 2001).

¹⁸⁹ DELOITTE AND TOUCHE, ACTUARIAL STUDY FOR THE WEST VIRGINIA SRF 7-23 (1993) (on file with author).

¹⁹⁰ *Id.*

age or other large liability claims could be assessed against the State” of West Virginia.¹⁹¹ The report did consider that DEP would spend money to treat water at two sites then featuring pollution discharge problems (the F&M Coal and DLM sites). However, it did not and could not project the money on water treatment that DEP would have to spend to treat pollution discharges on other sites and how those expenditures might affect the SRF.¹⁹² The report also did not contemplate the financial effect that more than fifteen years of water treatment at the DLM and F&M sites might have upon the SRF.

What the actuarial report was able to do, however, was state with credibility that, as of June 30, 1992, the SRF featured a deficit of \$14,039,462.¹⁹³ While the report was hopeful that the SRF would eventually begin to receive a positive net income, the report projected that this would not occur until at least 1994 and also predicted that the SRF could suffer annual net losses of up to \$4,575,000 between 1992 and 1997.¹⁹⁴ One cause of the approximately \$14 million deficit identified by Deloitte and Touche was that the total cost of reclamation in 1993 was averaging approximately \$4,000 per acre while the amount of a reclamation bond posted for that same acreage was between \$2,000 and \$3,000 per acre.¹⁹⁵ Some sites surveyed by Deloitte and Touche featured bonds of less than \$1,000 per acre.¹⁹⁶ While recognizing that a “lower bonding amount supplemented by coal tax and other revenue does tend to provide economic opportunity for the smaller, less capitalized operator,” Deloitte and Touche recommended that DEP consider raising the bond amount to the SRF’s actual, current reclamation cost, or in the alternative, increase SRF funding from other sources.¹⁹⁷

Deloitte and Touche’s report touched on a flaw that remained in the West Virginia regulatory program following the changes made to West Virginia’s SCMRA program during the 1992-93 Legislative sessions. While the site specific bonding requirements passed by the Legislature in 1992-93 meant that mines with larger potential pollution problems would have to post larger bonds, site specific bonds were still capped at a rate of \$5,000 per acre. Often, the cost of reclaiming a site with environmental problems, such as pollution

¹⁹¹ *Id.*

¹⁹² *Id.* at 4.

¹⁹³ *Id.* at 7.

¹⁹⁴ *Id.* at 7-9.

¹⁹⁵ *Id.* at 5. Another interesting fact that Deloitte and Touche’s Report presented was that it cost approximately \$3,500 to reclaim a disturbed acre on a surface mining operation while it cost twice this amount, approximately \$7,000, to reclaim a disturbed acre on an underground mining operation. *Id.* at 26.

¹⁹⁶ *Id.* at 6.

¹⁹⁷ *Id.* at 5.

discharges, can be in the millions of dollars, due to the perpetual nature of treatment needed at those sites.¹⁹⁸

Up until the mid-1990's, DEP officials took the legal position that the SRF did not have to be used to treat polluted water at abandoned mine sites with bond forfeiture monies.¹⁹⁹ The West Virginia Supreme Court of Appeals, statutory provisions, and OSM took a contrary view. In 1994, the West Virginia Supreme Court of Appeals ruled that under the West Virginia Code, DEP "has a mandatory, nondiscretionary duty to utilize monies from the SRF, up to twenty-five percent of the annual amount, to treat AMD at bond forfeiture sites when the proceeds from forfeited bonds are less than the actual cost of reclamation."²⁰⁰ This ruling, and subsequent adherence to it by DEP, served to help clean up the environment, but also served to place additional strain on the State's SRF. A report submitted to the Legislature by DEP in 1994 noted that of the 700 sites that were then part of West Virginia's Special Reclamation Program, 98 of those sites featured acid discharges.²⁰¹ This report estimated that if all of these discharges were required to meet state and federal water quality standards, the cost of treatment would be \$7.4 million initially and \$4.7 million annually.²⁰² "More significantly, the long term liability against the SRF would grow geometrically to a maximum of \$53 million after five years."²⁰³ The report characterized such growth as "fiscally irresponsible."²⁰⁴

Recognizing the deficit in the SRF identified by Deloitte and Touche in its 1993 report and costs associated with future water treatment, DEP proposed in 1994 to seek legislative approval of a five cent increase in the SRF's special reclamation tax.²⁰⁵ At that time, DEP projected that raising the fee by this amount would raise approximately \$7 million for DEP's SRF.²⁰⁶ After this fee increase was proposed, West Virginia Coal Association President Bill Raney

¹⁹⁸ An example of this can be found by analyzing DEP's treatment of the DLM Alton site. DEP has spent over \$3.8 million in treating this site since treatment began in 1992. This information was obtained from the Department of Environmental Protection's Office of Special Reclamation (on file with author).

¹⁹⁹ See BOND FORFEITURE REPORT, *supra* note 9.

²⁰⁰ *State ex. rel. W. Va. Highlands Conservancy v. W. Va. Div. of Env'tl. Prot.*, 447 S.E.2d 920, 925 (W. Va. 1994).

²⁰¹ See BOND FORFEITURE REPORT, *supra* note 9, at v-vi.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Letter from James Blankenship, Jr., Director, Charleston Field Office, Office of Surface Mining, to David C. Callaghan, Director, West Virginia Division of Environmental Protection (Aug. 30, 1994) (on file with author).

²⁰⁶ *Id.*

vowed that the coal industry would oppose the tax increase.²⁰⁷ The Legislature did not raise the per ton coal fee and no additional revenues were generated for the SRF despite OSM's finding that the SRF had a deficit of at least \$22.2 million in June, 1994.²⁰⁸

In 1995, OSM determined that the SRF had \$62 million less than what it needed to reclaim the mine sites then covered by the SRF program.²⁰⁹ Along with this finding, OSM again found that the West Virginia Alternative Bonding System no longer met the requirements of federal law because "the amount of bond and other guarantees under the West Virginia program are not sufficient to assure the completion of reclamation."²¹⁰ Moreover, OSM

disapproved parts of DEP's proposed amendments to [West Virginia's] alternative bonding system program. OSM ordered West Virginia to submit a proposed [program] amendment . . . [that would] (1) remove the twenty-five percent limitation on expenditure of funds for water treatment or otherwise provide for treatment of polluted water discharge from bond forfeiture sites, (2) remove the state law provision that allows collection of the special reclamation tax only when the special reclamation fund's liabilities exceed its assets, and (3) eliminate the deficit in the State's alternative bonding system and ensure sufficient funds will be available to complete reclamation, including treatment of polluted water, at all existing and future bond forfeiture sites.²¹¹

West Virginia failed to enact all of OSM's required amendments until the 2001 special legislative session.²¹²

Also in 1995, DEP and OSM formed a joint team to evaluate the SRF and the issue of whether the SRF generated enough revenue to exceed its ac-

²⁰⁷ See *Tax To Clean Up Streams Gets Support*, CHARLESTON DAILY MAIL, Aug. 5, 1994, at 6B.

²⁰⁸ See West Virginia Regulatory Program, 60 FED. REG. 51,900, 51,910 (Oct. 4, 1995). This \$22.2 million deficit did not even contemplate the cost of treating water associated with bond forfeiture sites. See *id.*

²⁰⁹ See Ward, *supra* note 170, at 3A.

²¹⁰ West Virginia Regulatory Program, 60 Fed. Reg. at 51,910.

²¹¹ *W. Va. Highlands Conservancy v. Norton*, 137 F. Supp. 2d 687, 690 (S.D. W. Va. 2001), *dismissed in part by* 147 F. Supp. 2d 474 (S.D. W. Va. 2001), *modified by* 161 F. Supp. 2d 676 (S.D. W. Va.), *modified by* 190 F. Supp. 2d 859 (S.D. W. Va. 2002), *modified by* 238 F. Supp. 2d 761 (S.D. W. Va. 2003) (citations omitted).

²¹² See *id.* at 690-91; see also *infra* Part VII.D.

crued liabilities.²¹³ On December 6, 1995, DEP Director Laidley McCoy notified OSM that DEP was recommending that “appropriate legislation be developed to remove the current 5000 dollar per acre site-specific bond cap,” and to continue the collection of the special reclamation tax without regard to the current asset/liability ratio in the SRF.²¹⁴ During the 1995 West Virginia Legislative Session, DEP introduced legislation to implement the proposals referenced by Director McCoy.²¹⁵ The Legislature passed neither of DEP’s proposals.²¹⁶

In a 1997 report, OSM stated that “under current projections, the [SRF] will not be sufficient to eliminate the backlog of unreclaimed forfeiture sites for 10 to 20 years without any consideration of other sites added for water treatment.”²¹⁷ In 1998, the number of unreclaimed forfeiture sites grew even larger as coal companies forfeited an additional sixty-four mine sites covering 2,176 acres.²¹⁸

While DEP cleaned up eleven abandoned coal mines, consisting of 371 acres of mined land, in 1999, the number of bond forfeiture sites continued to grow and outpace the rate at which DEP was able to reclaim those sites.²¹⁹ In 1999, SCMRA permittees abandoned twenty-three more mine sites and added 871 acres of land to the number of acres that DEP was required by law to reclaim.²²⁰ In 1999, there were 11,446 acres of mine sites that DEP needed to reclaim.²²¹ To reclaim these sites, DEP needed an additional \$62 million.²²² In its 1999 report on the West Virginia Program, OSM noted that DEP was only spending SRF money at five of the sixty-seven abandoned mine sites which

²¹³ Letter from Michael Castle to Allen Klein, *supra* note 144.

²¹⁴ Letter from Laidley Eli McCoy, Director, West Virginia Division of Environmental Protection, to James Blankenship, Director, Charleston Field Office, Office of Surface Mining (Dec. 6, 1995) (on file with author).

²¹⁵ Letter from Mark A. Scott, Deputy Director, West Virginia Division of Environmental Protection, to Mr. James C. Blankenship, Jr., Director, Charleston Field Office, Office of Surface Mining, Reclamation and Enforcement (May 16, 1996) (on file with author).

²¹⁶ *Id.*

²¹⁷ See Ward, *supra* note 170, at 3A.

²¹⁸ See *id.*

²¹⁹ Ken Ward, Jr., *West Virginia Mine Cleanup Fund Deficit Growing, Too Many Studies of the Problem*, THE CHARLESTON GAZETTE, May 30, 2000, at 1A, available at LEXIS, News Library, The Charleston Gazette File.

²²⁰ See *id.*

²²¹ See OFFICE OF SURFACE MINING, U.S. DEP’T OF THE INTERIOR, ANNUAL EVALUATION SUMMARY REPORT FOR THE REGULATORY AND ABANDONED MINE LANDS PROGRAMS ADMINISTERED BY THE STATE OF WEST VIRGINIA FOR EVALUATION YEAR 1999 A-7 tbl. 6 [hereinafter EVALUATION SUMMARY REPORT 1999], available at <http://www.osmre.gov/oversight/westvirginia99.pdf>.

²²² See Ward, *supra* note 219, at 1A.

were producing pollution discharges, and the “WVDEP bonding system [in place at this time] is inadequate to complete land reclamation and abate water pollution.”²²³ Even if no new abandoned mine sites were added in 1999 or after to the list of sites which DEP would be required to reclaim, under the fiscal condition of the SRF in 1999, “the [SRF would] not be sufficient to eliminate the backlog of unreclaimed forfeiture sites for 20 years.”²²⁴

By 1999, OSM had been annually warning DEP for ten years that West Virginia’s SRF was under-funded.²²⁵ In mid-1999, DEP completed the second phase of the studies it had commissioned in 1995 to examine the financial solvency of West Virginia’s SRF and Alternative Bonding System. The second phase of the studies noted that: (1) DEP needed to begin water treatment at over 100 bond forfeited mining sites which featured untreated pollution discharges, (2) the cost of treating pollution discharges on all bond forfeited mining sites then existing would require a one time expenditure of \$16 million and annual expenditures of over \$5 million, and (3) West Virginia’s current bonding system was “inadequate to cover these costs.”²²⁶

The second phase of DEP and OSM’s joint studies also offered some hope because it found that the SRF could eventually become financially solvent if the SRF was not required to pay for water treatment, the SRF’s responsibilities were limited to land reclamation, and additional revenue sources were created to pay for untreated pollution discharges at bond forfeited sites.²²⁷ Two recommendations found in a December 11, 1998 draft of the study called for DEP to maximize use of its Clean Water Act enforcement authority to mitigate water treatment liabilities which were accruing to the SRF, and for DEP to develop a fund separate from the ordinary SRF, which could be used to fund water treatment.²²⁸ According to this 1998 draft, this new bifurcated fund should feature “a funding method weighted toward the exposure of the permitted operation to potential long term water treatment liabilities.”²²⁹

April of 2000 saw DEP and the coal industry establish a bonding work group whose objective was to “determine the scope and financial cost for long-term treatment of AMD and to develop options for financial assistance mecha-

²²³ ANNUAL EVALUATION SUMMARY REPORT 1999, *supra* note 221, at 7.

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ Letter from Glenda Owens, Acting Director, United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement, to Michael O. Callaghan, Secretary, West Virginia Department of Environmental Protection (June 29, 2001) (on file with author).

²²⁷ WEST VIRGINIA ALTERNATIVE BONDING SYSTEM REVIEW, PHASE II REPORT OF THE BONDING WORK TEAM 1 (June 1999) (on file with author) [hereinafter PHASE II REPORT]; *see also* West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,449 (Dec. 28, 2001).

²²⁸ *See id.* (draft on file with author).

²²⁹ *Id.*

nisms that provide the capability to fund long-term treatment costs.”²³⁰ This group’s efforts resulted in a contract between DEP and Marshall University to develop ideas on how to fund long-term treatment costs.²³¹

According to OSM records, by the year 2000, DEP had paid an average of nearly \$3,000 to reclaim every acre of land reclaimed by its SRF.²³² DEP’s records show that the average cost of reclamation per acre in 1995 was \$3,208.96.²³³ Between 1992 and 2000, the average bond posted for mines that were abandoned was about \$700.²³⁴

In July of 2000, a citizens group, the West Virginia Highlands Conservancy, and others, filed a formal “notice of intent” to sue OSM to make the federal agency take over DEP’s reclamation bonding program via what is referred to as a 30 CFR Part 733 action. In its notice of intent to sue, the Highlands Conservancy made the following allegations:

DEP . . . is neither maintaining nor enforcing the surface mining program as Congress intended. Until now, we have been reluctant to bring an action against OSM to compel it to withdraw its approval from the State program because we had hoped that the DEP would be able to correct the deficiencies on its own. West Virginia should be able to enforce and maintain its own program as other states do, and we hope that it will be able to do so again soon . . . Currently, however, DEP is not up to the job . . . DEP, which does not have the ability to perform the serious technical and economic analysis necessary to protect the State’s environment and communities, must not be allowed to retain its authority to oversee and permit the elimination of West Virginia’s irreplaceable streams and forests. [M]ost disturbing is DEP’s failure to address the deficiencies in its alternative bonding system and its failure to maintain adequate staffing levels. By requiring inadequate bonds, DEP has grossly under-funded its SRF, making it impossible to complete reclamation at all existing and future bond forfeiture sites. The failure to require adequate bonding not only harms the environment, but will eventually harm all West Virginia taxpayers when they are

²³⁰ Letter from Michael Castle to Allen Klein, *supra* note 144.

²³¹ See *infra* Part VII.A.

²³² See Ward, *supra* note 219, at 1A.

²³³ Memorandum from Rich Casdorff, Program Manager II, West Virginia Division of Environmental Protection, to Pete Pitsenbarger, Chief, West Virginia Division of Environmental Protection (Apr. 11, 1996) (on file with author).

²³⁴ See Ward, *supra* note 219, at 1A.

forced to pay for the reclamation that the law requires coal operators to perform.²³⁵

By not hiring adequate staff, the Conservancy alleged that DEP "has created a situation where, in OSM's words, "employees are overwhelmed with daily regulatory duties and do not have sufficient time for activities to prevent or minimize problems."²³⁶ The Conservancy also stated that under federal rules, OSM was required to either take over the West Virginia mining regulatory program or hold a public hearing in the State "to remedy the undisputed deficiencies in the State program."²³⁷

After the Conservancy filed its notice of intent to sue in July of 2000, DEP informed OSM in August 2000 that DEP intended to propose a solution to the inadequate Alternative Bonding System that would: (1) bifurcate the State's existing Alternative Bonding System into land reclamation and water treatment, (2) use an outside contractor to complete a feasibility study on funding options with a draft report due in November of 2000, and (3) present a final report with suggested permanent changes to the State's Alternative Bonding System in early January 2001 so that the issue could be taken up during the 2001 legislative session.²³⁸

In his August 2000 letter, DEP Director Castle indicated that "[c]reating a water treatment bonding component [in the SRF] addresses bond forfeitures and existing permits with AMD issues while providing a funding mechanism to insure comprehensive treatment for the long term."²³⁹

According to Castle, DEP needed to perform further studies to determine how this additional funding for AMD treatment would be provided.²⁴⁰ "We are currently in discussions with Marshall University about conducting a feasibility study relative to the conceptual plans under development," Castle told OSM.²⁴¹ "This study should allow us to test the veracity and fiscal soundness of any solutions proposed by this concept."²⁴² OSM previously ordered DEP to

²³⁵ Ken Ward, Jr., *Citizens Group Threatens Suit for Feds to Take Over DEP*, THE SUNDAY GAZETTE-MAIL (Charleston, W. Va.), July 16, 2000, at 2B.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Letter from Allen Klein, Regional Director, Office of Surface Mining, to Michael Castle, Director, West Virginia Division of Environmental Protection (Sept. 29, 2000) (on file with author).

²³⁹ Letter from Michael Castle to Allen Klien, *supra* note 144.

²⁴⁰ See Ken Ward, *DEP's Answer to Mine Cleanup, More Studies Funding Options for Reclamation to be Examined, Short on Money*, THE SUNDAY GAZETTE-MAIL, Oct. 29, 2000, at 6B.

²⁴¹ *Id.*

²⁴² *Id.*

come up with a concrete plan to make the SRF solvent by December 1995.²⁴³ DEP had not completed that task by OSM's deadline, and OSM had not forced the State to act.²⁴⁴

In response to DEP's August 2000 letter from Director Castle, OSM responded in a letter dated September 29, 2000, from OSM Regional Director Al Klein. Klein gave West Virginia until thirty days after the end of the 2001 legislative session to submit its plan to OSM on how DEP would fix its Alternative Bonding System.²⁴⁵ Klein described this time frame as West Virginia's "final opportunity" to correct its bonding program before formal federal intervention.²⁴⁶ Klein's letter also expressed to DEP that OSM felt "the bonding/water quality problem is one of the most serious issues confronting West Virginia," and that there were "serious deficiencies with the State's alternative bonding system that must be resolved."²⁴⁷

Not satisfied with OSM's and DEP's actions, in November of 2000, the West Virginia Highlands Conservancy filed a lawsuit against OSM and DEP in a bid to force OSM to take action against DEP to remedy DEP's inadequate bonding program.²⁴⁸ The Conservancy cited the Quintain Development site as proof that the State's mine cleanup program was a mess.²⁴⁹ The Conservancy stated that, "[a]lthough the disturbed area on Quintain Development permit was only about 200 acres, it will cost nearly four million dollars to reclaim it."²⁵⁰ The Conservancy asked for a court order to force OSM to take over regulation of the West Virginia coal mining industry from DEP.²⁵¹ The Conservancy also asked for a court order to block any new permits from being issued without adequate reclamation bonds.²⁵²

One of the main problems identified by the Conservancy in its suit was that "DEP's special reclamation fund does not have sufficient funds to address the potential risks and consequences of abandoned, unreclaimed or potential future coal waste impoundment failures in West Virginia."²⁵³ The lawsuit noted

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ Letter from Allen Klein to Michael Castle, *supra* note 238.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ See Ken Ward, Jr., *Lawsuit Alleges Serious Flaws in Mine Bonds*, THE SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Nov. 19, 2000, at 2B.

²⁴⁹ See *id.*

²⁵⁰ *Id.*

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ *Id.*

that the United States Mine Safety and Health Administration found that there are thirty-two coal waste dams in West Virginia that have a moderate or a high potential to collapse into underground mines.²⁵⁴ The Conservancy stated

Coal waste impoundment failure . . . are bonded in West Virginia under the State's alternative bonding system. Because the alternative bonding system is insolvent, much of the costs of cleanup for the significant environmental degradation caused by such spills will be externalized so that taxpayers and users of the waters will be forced to bear the costs of cleanup. This shifting of costs of cleanup from coal operators to water users and state taxpayers is contrary to Congress' clear intent that operators post bonds adequate to assure complete reclamation in the event of forfeiture.²⁵⁵

In its complaint, the Conservancy also cited Arch Coal Inc.'s proposed expansion of its Hobet Mining Inc. subsidiary's Dal-Tex mountaintop removal mine near Blair, Logan County to illustrate what it perceived to be the problem in West Virginia's SRF.²⁵⁶ Specifically, the lawsuit claimed:

If Hobet were to default on its bond during Phase 7 of its operations at the Spruce Mine, it would cost more than fifty million dollars to reclaim the mine to its proposed post-mining land use. This would be the minimum cost for land reclamation alone, exclusive of potential water treatment liabilities. Under the State's alternative bonding system, the maximum bond for the Spruce Mine would be approximately sixteen million dollars.²⁵⁷

The Conservancy lawsuit continued on with its allegations, stating that

although these requirements will increase the cost of reclamation, DEP has not adjusted its guidelines for the special reclamation fund to account for this increase. Despite the insolvency of the West Virginia alternative bonding system, the DEP continues to issue permits like the permit for Hobet's Spruce Mine, pursuant to that system.²⁵⁸

²⁵⁴ See *id.*

²⁵⁵ *Id.*

²⁵⁶ See *id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

As part of its lawsuit, the Highlands Conservancy requested that the court assume that all mining sites might need to be forfeited and requested that the court only allow OSM to approve an Alternative Bonding System for West Virginia which would fiscally be capable of paying for reclamation at all of those sites.²⁵⁹

On April 18, 2001, DEP requested additional time to develop and obtain approval of statutory and regulatory changes to the State's bonding provisions.²⁶⁰ In addition, DEP requested that OSM conduct an informal review of a report entitled "The Mountain State Clean Water Trust Fund" (i.e. the "Hicks Plan").²⁶¹

In response to the Highlands Conservancy suit filed in November of 2000, Chief U.S. District Judge Charles H. Haden, II for the Southern District of West Virginia ruled on April 5, 2001, that the West Virginia Alternative Bonding System was superseded by the federal bonding program as the West Virginia Alternative Bonding System was less rigorous than and inconsistent with the federal bonding program.²⁶² The State Alternative Bonding System was inconsistent with the federal program because it "no longer [met] the objectives and purposes of the conventional bonding program set forth in [Section 1259] of SMCRA."²⁶³ Judge Haden did not order DEP to immediately change its bonding system. But he did rule that, as a matter of law, West Virginia's Alternative Bonding System was so flawed that the tougher federal program automatically took effect in West Virginia.²⁶⁴

As DEP had been named as a defendant in the Highlands Conservancy's lawsuit, this April ruling by Judge Haden would have forced DEP to implement the federal bonding provisions found in Section 509(a) of SMCRA had it not been for the Fourth Circuit Court of Appeals' subsequent April 24, 2001, opinion in *Bragg v. West Virginia Coal Ass'n*.²⁶⁵ In the *Bragg* opinion, the Fourth Circuit ruled that federal courts do not have jurisdiction over state defendants in the type of citizen suit that was brought under SMCRA by the Highlands Con-

²⁵⁹ See *W. Va. Highlands Conservancy v. Norton*, 238 F. Supp. 2d 761, 763 (S.D. W. Va. 2003).

²⁶⁰ See *West Virginia Regulatory Program*, 66 Fed. Reg. 67,446, 67,446 (Dec. 28, 2001). For a discussion of the "Hicks Plan," see *infra* Part VII.A.

²⁶¹ See *infra* Part VII.A.

²⁶² See *W. Va. Highlands Conservancy v. Norton*, 137 F. Supp. 2d 687, 694 (S.D. W. Va. 2001), *dismissed in part* by 147 F. Supp. 2d 474 (S.D. W. Va. 2001), *modified* by 161 F. Supp. 2d 676 (S.D. W. Va. 2001), *modified* by 190 F. Supp. 2d 859 (S.D. W. Va. 2002), *modified* by 238 F. Supp. 2d 761 (S. D. W. Va. 2003).

²⁶³ *Id.* (quoting *West Virginia Regulatory Program*, 60 Fed. Reg. 51,900, 51,910 (Oct. 4, 1995)).

²⁶⁴ See *id.*

²⁶⁵ 248 F.3d 275, 300 (4th Cir. 2001).

servancy against DEP in *Bragg*.²⁶⁶ Judge Haden interpreted the Fourth Circuit's ruling in *Bragg* to preclude his jurisdiction over DEP in the Highlands Conservancy's bonding suit, and in May 2001 he dismissed DEP as a defendant from the bonding suit.²⁶⁷ Thus, while he had ruled that DEP's bonding program was inadequate, Judge Haden ended up not being able to force DEP to implement Section 509(a) of SMCRA bonding. DEP did not implement Section 509(a) bonding and the inadequacies in West Virginia's Alternative Bonding System and DEP's SRF continued.

DEP Director Michael Callaghan's statements concerning the adequacy of reclamation bonds followed a finding that Judge Haden had made five years earlier in *Cat Run Coal Co. v. Babbitt*.²⁶⁸ In that case, Haden had noted that because the amount of a mining reclamation bond is artificially capped at \$5,000 per acre, with the limited exception provided for in West Virginia Code section 22-3-11(a), a reclamation bond by itself is often inadequate to cover the full cost of reclaiming an abandoned or orphaned West Virginia mining site.²⁶⁹

As alluded to by Callaghan and by Judge Haden, numerous examples of how a reclamation bond by itself is often inadequate to pay for the full cost of mining reclamation are found throughout the history of West Virginia's mining regulatory program. Some examples of inadequate reclamation bonds are found by analyzing the Quintain Development, Amigo Smokeless, Bickford Mining, Green Mountain Energy, Inc., Falcon, and Upper Big Branch mining sites.

In August 1997, DEP issued Quintain Development a mountaintop removal surface mining permit.²⁷⁰ In January 2000, DEP revoked the company's permit, forfeited Quintain's posted reclamation bond, and then collected that bond.²⁷¹ Because of reclamation bond amount limitations imposed by statute, Quintain had posted a reclamation bond for the site in the amount of only \$1 million.²⁷² It will likely cost DEP nearly \$4 million to fully reclaim the Quintain site.²⁷³ DEP's SRF must pay for the \$3 million dollar difference between the reclamation bond amount and the cost of full site reclamation.

²⁶⁶ See *id.* at 297-98.

²⁶⁷ See *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 481 (S.D. W. Va. 2001), *modified by* 161 F. Supp. 2d 676 (S.D. W. Va. 2001), *modified at* 190 F. Supp. 2d 859 (S.D. W. Va. 2002), *modified by* 238 F. Supp. 2d 761 (S.D. W. Va. 2003).

²⁶⁸ 932 F. Supp. 772, 772 (S.D. W. Va. 1996).

²⁶⁹ *Id.* at 775 n.7.

²⁷⁰ See *Ward*, *supra* note 235, at 2B.

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *id.*

DEP issued permit number O-161-83 to Amigo Smokeless Coal Company on November 28, 1983.²⁷⁴ On November 15, 1996, DEP revoked this permit.²⁷⁵ It has cost DEP over \$1.9 million to reclaim this Raleigh County mining site.²⁷⁶ Amigo Smokeless only posted a reclamation bond in the amount of \$170,000 with DEP.²⁷⁷

Paul Kizer's Bickford Mining underground mining operation in Raleigh County only posted a \$10,000 bond whenever it obtained its permit to disturb seventeen surface acres in conjunction with its underground mining operations on West Virginia SCMRA permit U007885.²⁷⁸ Now, it is costing DEP, and its Special Reclamation Program, over \$54,000 to reclaim the site.²⁷⁹ Another Paul Kizer company, Green Mountain Energy, posted a \$16,000 bond for the nine acres that its underground mine disturbed during mining.²⁸⁰ The amount of money it is costing DEP to reclaim this site is \$54,635.²⁸¹

The DEP issued Independence Coal Company two different mining permits in 2001: a permit for its Falcon mine site near Van in Boone County, West Virginia, and a permit for its Upper Big Branch Site near Twilight in Boone County.²⁸² Independence posted a \$2.1 million, or \$3,700 per acre, bond for its Falcon mine site and posted a \$3.7 million, or \$5,000 per acre reclamation bond (the maximum amount of bond required by statute), for its Twilight operation.²⁸³ Despite the posting of these large bonds, DEP Secretary Michael Callaghan stated that it would probably cost much more than the amount of the bonds posted to reclaim these sites in the event Independence abandoned these sites and DEP was forced to reclaim them.²⁸⁴

²⁷⁴ Information obtained from West Virginia Department of Environmental Protection's Environmental Resource Information System.

²⁷⁵ *Id.*

²⁷⁶ Affidavit of Charles Miller, *Adventure Resources, Inc.*, U.S. Bankruptcy Court for the Southern District of West Virginia, Case No. 92-50482, Adversary Proceeding No. 99-0046.

²⁷⁷ West Virginia Department of Environmental Protection's Environmental Resource Information System.

²⁷⁸ *Id.*

²⁷⁹ Affidavit of Charles Miller, *Adventure Resources, Inc.*, U.S. Bankruptcy Court for the Southern District of West Virginia, Case No. 92-50482, Adversary Proceeding No. 99-0046.

²⁸⁰ West Virginia Department of Environmental Protection's Environmental Resource Information System.

²⁸¹ Affidavit of Charles Miller, *Adventure Resources, Inc.*, U.S. Bankruptcy Court for the Southern District of West Virginia, Case No. 92-50482, Adversary Proceeding No. 99-0046.

²⁸² Ken Ward, Jr., *Mountaintop Removal Mine Issue Heads for Showdown, Even DEP Boss Expects Court to Reject Permits for Massey*, THE SUNDAY GAZETTE-MAIL, May 13, 2001, at 1A.

²⁸³ *Id.*

²⁸⁴ *Id.*

Although Judge Haden did not grant the Highlands Conservancy a preliminary injunction following his May 29, 2001 hearing in the case, OSM, recognizing the overall inadequacy of West Virginia's Alternative Bonding System, proceeded with its attempt to correct West Virginia's Alternative Bonding System. On June 29, 2001, OSM initiated actions under 30 C.F.R. § 733.12(b) to take over West Virginia's Alternative Bonding System.²⁸⁵ In its June 29, 2001, Part 733 notification, OSM notified West Virginia that to avoid having OSM take over the State bonding regulatory program, DEP would have to initiate certain remedial measures by July 27, 2001.²⁸⁶ These remedial measures were designed to address the problems in West Virginia's bonding program, identified by OSM at 30 C.F.R. § 948.16 (kkk), (jjj), and (lll).²⁸⁷ OSM also required DEP to submit, by no later than 45 days after the end of the 2002 regular session of the West Virginia Legislature, fully enacted and adopted statutory and regulatory revisions to remedy the deficiencies in West Virginia's bonding program pursuant to 30 C.F.R. § 948.16 (kkk), (jjj), and (lll).²⁸⁸ As stated in its Part 733 notice, OSM told DEP that if DEP failed to take corrective action, it would recommend to the Secretary of the Interior that the Secretary partially withdraw approval of the State program and implement a partial Federal regulatory program.²⁸⁹

Not satisfied with OSM's initiation of a Part 733 action against DEP in June, the Highlands Conservancy continued its case against OSM. OSM moved to dismiss the case against it in July 2001, given OSM's initiation of Part 733 proceedings; however, in an August 31, 2001, ruling and opinion, Judge Haden denied that motion.²⁹⁰ In his opinion, Haden said that "[s]ince at least 1991 . . . OSM has known officially that the West Virginia reclamation bonding program failed (and today continues to fail) to satisfy the federal statutory requirement for adequate funding."²⁹¹

[In 1995] OSM reported . . . that on 'October 1, 1991 . . . OSM notified West Virginia in accordance with 30 C.F.R. § 732.17 that its regulatory program no longer met all Federal requirements.' The federal agency's annual reviews since 1989

²⁸⁵ See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,446 (Dec. 28, 2001).

²⁸⁶ See *id.* at 67,446-47.

²⁸⁷ See *id.*

²⁸⁸ See *id.*

²⁸⁹ See *id.*

²⁹⁰ See *W. Va. Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676, 679-80 (S.D. W. Va. 2001), *modified by* 190 F. Supp. 2d 859 (S.D. W. Va. 2002), *modified by* 238 F. Supp. 2d 761 (S.D. W. Va. 2003).

²⁹¹ *Id.* at 679.

showed the State alternative bonding system's liabilities exceeded [its] assets, and by 1994, the deficit was twenty-two million dollars While approving the proposed increases in the West Virginia site specific bond cap and the per-ton tax rate, OSM found these increases 'still insufficient to ensure complete reclamation, including treatment of polluted water.' OSM concluded . . . that West Virginia's alternative bonding system no longer meets the requirements of 30 C.F.R. § 800.11(e). Furthermore, it is not achieving the objectives and purposes of the conventional bonding program set forth in section 509 of SMCRA since the amount of bond and other guarantees under the West Virginia program are not sufficient to assure the completion of reclamation.²⁹²

Haden continued on to note that the SRF's decade-long inadequacy has resulted in "unreclaimed mine sites, polluted state streams, and 'an immense state liability, incurred by the mine operators, but borne by the taxpayers.'"²⁹³ While Haden noted that OSM had taken a step towards remedying the decade long inadequacies in West Virginia's bonding program, Haden described this step as "tentative" and noted that the injury to the plaintiff Highlands Conservancy would continue until

(1) West Virginia implements a state reclamation bonding system sufficient to satisfy SMCRA §§ 1259(a) and 30 C.F.R. § 800.11, or (2) OSM Director Owens substitutes federal enforcement, or (3) Secretary Norton withdraws approval of the State program in whole or part and substitutes federal enforcement or promulgates a federal program.²⁹⁴

Haden noted that OSM Director Owens began remedying the inadequacies in West Virginia's bonding program in June 2001 by issuing the Part 733 letter.²⁹⁵ However, it was apparent that "the conclusion of the process, a remedy for Plaintiff's alleged wrong, lies somewhere in the distant future."²⁹⁶ While Haden denied the Highland Conservancy's motion for a preliminary injunction against OSM because he found that the compliance deadlines set forth in OSM's Part

²⁹² *Id.* at 679-80 (quoting *W. Va. Highlands Conservancy v. Norton*, 147 F. Supp. 2d 474, 479 (S.D. W. Va. 2001) (citations omitted).

²⁹³ *Id.* at 680.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

733 notification were reasonable,²⁹⁷ Haden did not dismiss OSM from the Conservancy's lawsuit and pressure remained on OSM to fix West Virginia's Alternative Bonding System through a takeover of West Virginia's reclamation bonding program.

VII. RECENT ATTEMPTS TO MODIFY WEST VIRGINIA'S ALTERNATIVE BONDING SYSTEM

In response to a call to action and threatened takeover of its program by OSM, a huge accumulated operating deficit in its SRF by the latter part of 2001, and judicial action by the federal district court for the Southern District of West Virginia, DEP decided to initiate legislative action in late 2001 to correct deficiencies in its Alternative Bonding System.²⁹⁸ Before deciding on a final legislative proposal, DEP analyzed three approaches to fixing its Alternative Bonding System.

A. *The Hicks Plan*

On September 6, 2000, DEP and the Center for Business and Economic Research at Marshall University entered into a Memorandum of Understanding that called for the development of a new bonding system under SCMRA to serve as an alternative to that system which was maintained by the State of West Virginia, in one form or another, during most of the 20th century. This Memorandum of Understanding called for Marshall to develop a multi-tiered bonding system "that will ensure the availability of the financial resources necessary to mitigate any negative impacts of coal mining activity on the quality of West Virginia's groundwater."²⁹⁹ The product of this Memorandum of Understanding, what is commonly referred to as the "Hicks Plan" or the "Mountain State Clean Water Trust Fund," was published in final draft form in May 2001 and creates a water treatment fund that can treat the current and estimated pollution

²⁹⁷ *Id.* at 684-85.

²⁹⁸ According to Judge Haden in *West Virginia Highlands Conservancy v. Norton*, the Highlands Conservancy's citizen suit

has jump-started long overdue state and federal agency action. Part 733 proceedings were begun [by OSM] only after the Conservancy moved the Court to order them begun. The State [of West Virginia] quickly responded with a plan and a special legislative session. This citizen suit already has prompted important results: both a date certain for OSM's final decision on the 7-Up Plan and the agency's promise, in the event of disapproval, to take Part 733 action immediately.

W. Va. Highlands Conservancy v. Norton, 190 F. Supp. 2d 859 (S.D.W.Va. 2002), *modified by* 238 F. Supp. 2d 761 (S.D. W. Va. 2003).

²⁹⁹ Memorandum of Understanding Between WV Division of Environmental Protection and Center for Business and Economic Research (CBER), Lewis College of Business, Marshall University (Sept. 6, 2000) (on file with author).

discharges from mining operations into perpetuity.³⁰⁰ The Hicks Plan is designed to prevent more coal firm defaults and at the same time “self-insure against the potential failure of coal mining firms, pay for [the Plan’s] administrative costs, and sunset itself as early as possible.”³⁰¹ Specific goals of the Hicks Plan include: (1) removing the liability for treating mine related environmental damage to West Virginia’s natural waterways from the SRF; (2) preserving incentives for firms to avoid environmental damage and invest in better abatement/treatment technologies; (3) establishing a fund sunset date of 2025, featuring a fully capitalized fund that generates interest payments to cover projected clean up costs; and (4) maintaining realistic but conservative assumptions for all forecasting.³⁰²

The Hicks Plan notes that West Virginia’s SRF is not currently adequate to treat both AMD and to perform land reclamation of defaulted mine sites.³⁰³ In response to this problem, the Hicks Plan bifurcates West Virginia’s SRF into two components: land and water.³⁰⁴ The Hicks Plan concentrates primarily on finding ways to treat water because, as the report’s authors state, the SRF is “without question, adequate to treat all deferred and forecasted land [reclamation needs] if water treatment demands are placed upon another funding source.”³⁰⁵

West Virginia’s traditional Alternative Bonding System spreads the responsibility for paying for defaulted firms’ water treatment among all coal operators, not just those who are discharging bad water from their sites. In addition, West Virginia’s traditional Alternative Bonding System operates somewhat like the Social Security System. While the SRF promises to pay for land and water reclamation at all sites which contribute to the SRF, the monies which are contributed into the SRF today are not left to rest in a bank account so that they may be used twenty years down the road from now. Instead, those funds are spent today to reclaim sites that require current reclamation. Taking West Virginia’s current Alternative Bonding System to its logical conclusion, and assuming perpetual water treatment, the last coal company standing in West Virginia would theoretically bear the burden of paying for ongoing water treatment at all of the sites that have been previously forfeited and which are still producing bad water at the time that coal company is operating. Some coal operators, such as A.T. Massey, have been critical of West Virginia’s Alternative Bonding System

³⁰⁰ MICHAEL J. HICKS ET AL., THE MOUNTAIN STATE CLEAN WATER TRUST FUND, A REPORT TO THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION (May 2001), *available at* http://www.marshall.edu/cber/Research/May_Draft.pdf.

³⁰¹ *Id.*

³⁰² *Id.* at 1.

³⁰³ *Id.* at 17.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 20.

because through the imposition of the per ton coal fee, they end up paying for reclamation, including water treatment, that should be the responsibility of other coal companies.³⁰⁶ DEP has admitted that West Virginia's current Alternative Bonding System is not fair in the way that it makes existing companies pay for past companies' misdeeds.³⁰⁷

The Hicks Plan attempts to address these fairness concerns as it does not spread the responsibility for water treatment at projected abandoned mine sites among all coal operators as evenly as West Virginia's traditional Alternative Bonding System. When compared with West Virginia's traditional Alternative Bonding System, the Hicks Plan requires larger payments from permittees who are actually treating water; it requires smaller payments from those permittees not treating water. The Hicks Plan is more economical than West Virginia's current Alternative Bonding System for those permittees who are not and who will not be treating pollutorial discharges from their sites.

Another benefit of the Hicks Plan is that, unlike funds contributed to West Virginia's Alternative Bonding System, funds contributed to the Hicks Plan Trust Fund today cannot all be spent as they are collected.³⁰⁸ Instead, some of these contributions are saved for expenditures that may need to occur well into the future.³⁰⁹ It appears that the savings provision of the Hicks Plan is designed to ensure the long-term viability of DEP's SRF.

The Hicks Plan has two time components: the initial funding phase and the perpetuity phase.³¹⁰ The Hicks Plan assesses the operator currently treating water with five different assessments.³¹¹ These assessments include a cash matched dedicated portfolio, a risk insurance annuity, a sunset annuity, an administrative annuity, and a water treatment fee.³¹² Operators not currently treating water only have to pay one assessment into the fund: the 3.6 cent per ton of clean coal water treatment fee.³¹³ The operation of the Hicks Plan can best be understood by utilizing hypotheticals.

³⁰⁶ See Brian Bowling, *Massey Opposes Mine Bond Deal, Company Has Sent Letters to Lawmakers to Fight Proposal*, CHARLESTON DAILY MAIL, Sept. 6, 2001, at 2C.

³⁰⁷ See *id.*

³⁰⁸ HICKS, *supra* note 300, at 21.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 12.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

1. Assessments Against Companies Not Currently Treating Water

Under the Hicks Plan, a coal mining company not currently treating water must pay 3.6 cents to the State for every ton of clean coal it produces in West Virginia.³¹⁴ This fee is referred to as the Water Treatment Fee.³¹⁵

The Water Treatment Fee operates similarly to the per ton of coal fee imposed under West Virginia's traditional Alternative Bonding System by West Virginia Code section 22-3-11(h).³¹⁶ If a coal company produced 1.2 million tons of coal per year, but was not required to treat water at its site to meet effluent requirements, under the 3.6 cent per ton coal tax imposed under the Hicks Plan, that company would have to pay the State only \$43,200 per year.

According to the Hicks Plan, a fee of 3.6 cents would generate \$5.14 million annually, which could be used to pay for the backlog of water reclamation needs.³¹⁷ Based on worst case production figures, as provided by the Energy Information Administration, the Hicks Plan forecasts that its 3.6 cent per ton tax would generate enough money to pay off all outstanding treatment costs DEP has accrued as a result of past bond forfeitures.³¹⁸

Unfortunately, the figures used by the Hicks Report may overestimate the amount of revenue that would be produced by a 3.6 cent per ton of coal fee. Using figures of Year 2002 Coal Production in West Virginia, a 3.6 cent per ton fee would only have produced \$5.10 million in revenues during 2002, not the \$5.14 million forecasted by the Hicks Report.³¹⁹ While this small difference may seem insignificant on a one year basis, the Hicks Plan calls for the 3.6 cent fee to be collected for 24 years.³²⁰ If only a 3.6 cent fee were collected over a 23 year period, and coal revenues from this tax remained at their current levels, the Trust Fund would realize approximately \$920,000 less in revenue than that amount of revenue projected by the Hicks Plan. This discrepancy would be even larger if annual revenues from the per ton coal fee sank below year 2002 levels. Depending on future actual reclamation costs, if this fee of the Hicks Plan were implemented, it might need to be revised. Fortunately, this eventuality was foreseen through the Hicks Plan's creation of a Trust Fund management team and a structured forecasting research effort which would monitor any defi-

³¹⁴ *Id.* at 14.

³¹⁵ *Id.*

³¹⁶ W. VA. CODE § 22-3-11(h) (2004).

³¹⁷ HICKS, *supra* note 300, at 16.

³¹⁸ *Id.*

³¹⁹ See REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL TO THE WEST VIRGINIA LEGISLATURE 2 tbl. 1 (Jan. 2, 2003) (on file with author) [hereinafter REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2003]. This report was authored in part by Dr. Hicks.

³²⁰ HICKS, *supra* note 300, at 14-15.

ciencies in revenues produced from the Water Treatment Fee and which would presumably recommend changes to the fee if need be.³²¹

2. Assessments Against Companies Currently Treating Water

If a coal company is currently treating water, under the Hicks Plan it would be required to pay several different assessments into a vehicle generically called a "Trust Fund."³²² The Trust Fund portion of the Hicks' Report is somewhat similar to other environmental bonding schemes that have been proposed in the past.³²³ Under what is referred to as a "flexible environmental assurance bonding system," if an operator is responsible for known environmental damages, he is charged for those damages and is levied an assurance bond equal to the "current best estimate of the largest potential future environmental damages amount."³²⁴ The bond is kept in an interest-bearing account for a predetermined time period.³²⁵ Portions of the bond along with interest on the bond principal can be returned to the offending operator, but only "if and when the [operator] could demonstrate that the suspected, [future] worst-case damages had not occurred or would be less than was originally assessed."³²⁶ If damages did occur, "portions of the bond would be used to rehabilitate or repair the environment."³²⁷ Portions of the bond might also be used to compensate injured parties.³²⁸ The advantage of this system is that the burden of proof concerning future possible damages and the cost of the uncertainty of future damages would be shifted away from the public and towards the private sector.³²⁹

Under the Hicks Plan Trust Fund scheme, if a coal company produced bad water, it cost \$472,556 annually to treat this water, and the company produced 1.2 million tons of coal annually, the company would have to pay to DEP either \$249,903 or \$721,659 per year.³³⁰ Forty-three thousand dollars of either amount would be generated from the 3.6 cent per ton tax on coal that every coal

³²¹ *Id.* at 16-17.

³²² *Id.* at 1.

³²³ See Costanza & Cornwell, *supra* note 40.

³²⁴ *Id.*

³²⁵ See *id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ See *id.*

³³⁰ HICKS, *supra* note 300, at app. D. The figures in this hypothetical are based on calculations presented in Appendix D of the Hicks Report. *Id.*

producer has to pay under the Hicks Plan.³³¹ If the Coal Company chose to treat its own bad water, it would effectively only pay to DEP \$249,903.³³² Of this \$249,103, \$43,000 would go to pay down the outstanding reclamation liabilities that DEP's SRF is currently charged with.³³³ The remaining \$205,903 would be divided between two funds: a Risk Annuity Fund and a Sunset Annuity Fund.³³⁴ Of the company's \$205,903 in contributions, \$94,511 would be directed into the Risk Annuity Fund; the remaining \$111,392 would become part of the Sunset Annuity Fund.³³⁵ Both the Risk Annuity Fund and the Sunset Annuity Fund would provide a financial hedge against the possibility that a firm treating water would for some reason leave a site unreclaimed.³³⁶

Specifically, a coal mining operation would be required to contribute money into a Sunset Annuity for a maximum period of 25 years.³³⁷ For the first eleven or so years, the operation would also have to contribute money into the Risk Annuity.³³⁸ The Risk Annuity assures that if one of the companies currently treating water fails and stops making payments into the Sunset Annuity before 25 years have expired, the goals of the Sunset Annuity in raising \$440 million can still be met and all of the companies making payments into the Sunset Annuity can still stop making payments into the Sunset Annuity approximately 25 years after the implementation of the Hicks Plan.³³⁹ In less than eleven years, the Risk Annuity would generate enough revenues to pay for 20% of the total, current, private costs companies expend on treatment.³⁴⁰

B. *The 20/20 Plan*

Deciding that the Hicks Plan was too complicated to implement,³⁴¹ in February 2001 DEP proposed a simpler fix to its bonding system woes. In this proposal, DEP proposed to increase the special reclamation per ton coal tax established by West Virginia Code section 22-3-11 from 3 cents to 23 cents for a

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 11.

³³⁸ *Id.* at 13.

³³⁹ *Id.* at 13-14.

³⁴⁰ *Id.* at 14.

³⁴¹ Interview with John Ailes, Special Assistant to the Director of the Div. of Mining and Reclamation, W. Va. Dep't of Env'tl. Prot. (Jan. 2003).

period of 18 months and at the same time increase the maximum per acre bond amount allowed for by West Virginia Code section 22-3-11 and -12 from \$5000 to \$20,000.³⁴² An increase in the maximum per acre bond limit would have been helpful as the State's reclamation costs on abandoned mine site sites in 2000 cost an average of \$5,400 per acre.³⁴³

This proposal to raise the special reclamation tax and the maximum per acre bond limit was commonly known as the 20/20 Plan. According to DEP's estimates, the 20/20 Plan would have raised about \$625 million over the next 25 years to treat AMD at mine sites covered by DEP's Special Reclamation Program.³⁴⁴ However, coal industry officials objected to DEP's 20/20 Plan, and it was not successfully pursued.³⁴⁵

C. *The 7&7 Plan*

Following the industry's objections to the 20/20 Plan, DEP revised its proposal to eliminate the deficit in the SRF and provide for water treatment at bond forfeiture sites. This revised plan became known as the 7&7 Plan, or alternatively, the 7-Up Plan. The 7&7 Plan called for a permanent increase from three cents to seven cents in the per ton clean coal tax imposed by West Virginia Code section 22-3-11(h).³⁴⁶ The 7&7 Plan also called for the collection of an additional seven cent tax on each ton of clean coal mined; this additional tax was designed to be collected for a period of thirty-nine months.³⁴⁷ Over this thirty nine month period, the receipts collected from the additional seven cent per ton tax were designed to eliminate the \$47.9 million deficit in the SRF.³⁴⁸ After the expiration of the thirty-nine month period, assuming that a specially

³⁴² Brian Bowling, *Group Seeks Takeover of Mine Bonding System; Federal Agency Now Doing Study of State Program*, CHARLESTON DAILY MAIL, Jan. 16, 2002, at 7A, available at LEXIS, News Library, Charleston Daily Mail File.

³⁴³ Brian Bowling, *Government Lawyer Confirms Bond System, Attorney for Agency Says Mining Bond System is Legal*, CHARLESTON DAILY MAIL, May 17, 2001, at 2A, available at LEXIS, News Library, Charleston Daily Mail File.

³⁴⁴ Ken Ward, Jr., *Coal Cleanups Could Cost \$2.6 Billion*, THE CHARLESTON GAZETTE, Apr. 2, 2001, at 10A, available at LEXIS, News Library, Charleston Gazette File.

³⁴⁵ Ken Ward, Jr., *Reclamation Tax Likely to Rise, DEP Chief Says*, THE SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Jan. 12, 2003, at 5B.

³⁴⁶ Intra-office Memorandum from Rita Pauley, Assistant to the General Counsel, to Michael Callaghan, Secretary, West Virginia Department of Environmental Protection, and Bill Adams, Jr., Deputy Secretary and General Counsel, West Virginia Department of Environmental Protection (Sept. 6, 2001) (on file with author). The permanent increase to seven cents a ton became part of what is now West Virginia Code section 22-3-11(h). See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,449 (Dec. 28, 2001).

³⁴⁷ See West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

³⁴⁸ See *id.*

appointed advisory committee found that the SRF was meeting certain financial guarantees, the fourteen cents per ton tax would be cut to seven cents per ton.³⁴⁹ The 7&7 Plan did not call for any increase in maximum per acre bonding limits.

On August 8, 2001, DEP submitted its 7&7 Plan by email to OSM's Charleston Field Office for review and comment. On August 28, 2001, and September 7, 2001, Roger Calhoun, Director of OSM's Charleston Field Office responded with OSM's comments to DEP's proposed 7&7 Plan.³⁵⁰ Comments from OSM on DEP's proposed 7&7 Plan were generally favorable, but highlighted some important issues with respect to the proposed legislation. In particular, OSM concluded that DEP's 7&7 Plan would generate sufficient revenues for about nine years, but future adjustments in the per ton coal tax would have to be made to ensure the long-term financial solvency of the SRF.³⁵¹

The West Virginia Legislature passed the gist of DEP's 7&7 Plan in the form of Senate Bill 5003 on September 15, 2001.³⁵² On September 17, 2001, DEP notified OSM that Senate Bill 5003 had been passed, and on September 24, 2001, DEP formally submitted Senate Bill 5003 to OSM as proposed program amendment.³⁵³

Relying on an internal OSM directive that allows approval of a proposed state ABS amendment that does not fully remedy all deficiencies so long as [that amendment] does not adversely affect ABS solvency OSM approved the West Virginia amendment [in the form of Senate Bill 5003], but deferred the question of whether [West Virginia's legislation] would eliminate the ABS deficit and 'ensure that sufficient money will be available to complete reclamation, including the treatment of polluted water, at all existing and future bond forfeiture sites.'³⁵⁴

D. Senate Bill 5003: The Final Version of the 7&7 Plan

As passed by the West Virginia State Legislature and approved by OSM, DEP's 7&7 Plan, a.k.a. Senate Bill 5003, (1) establishes the SRF Advisory Council to ensure the effective, efficient, and financially stable operation of

³⁴⁹ See *id.*

³⁵⁰ See *id.* at 67,447.

³⁵¹ See *id.*

³⁵² See *id.*

³⁵³ *Id.* at 67,449.

³⁵⁴ *W. Va. Highlands Conservancy v. Norton*, 190 F. Supp. 2d 859, 865 (S.D. W. Va. 2002) (citing and quoting 66 West Virginia Regulatory Program, 66 FED. REG. at 67,451), *modified by* 238 F. Supp. 2d 761 (S.D. W. Va. 2003).

the SRF; (2) provides for a contract with a qualified actuary to determine the SRF's soundness on a four-year basis; (3) increases the special reclamation tax rate to provide additional revenue for the reclamation of bond forfeiture sites; and (4) deletes language in the statute that limited expenditures from the State's Alternative Bonding System for water treatment.³⁵⁵ Amendments to West Virginia's regulatory program cannot be implemented and do not become effective until OSM approves those amendments.³⁵⁶ OSM bifurcated its approval of Senate Bill 5003. The increase in the reclamation tax called for by Senate Bill 5003 was approved by OSM in December 2001 and was implemented by DEP in January 2002 in accordance with the provisions of West Virginia Code section 22-3-11(h). OSM solicited comments on the rest of Senate Bill 5003, and by notice dated May 29, 2002, found that the amendments to the West Virginia Alternative Bonding System would eliminate the SRF's existing \$47.9 million deficit in about three years, but also noted the SRF would only retain a positive balance for about nine years.³⁵⁷ Changes made to SCMRA by Senate Bill 5003 are noted below.

1. Elimination of West Virginia Code Section 22-3-12(f)

West Virginia Code section 22-3-12(f) had required DEP to report to the Legislature every 90 days of DEP's progress in developing and implementing the site-specific bonding requirements of West Virginia Code section 22-3-12.³⁵⁸ West Virginia developed and adopted interim site-specific bonding rules in November of 1992.³⁵⁹ In April 1993, West Virginia adopted final legislative rules concerning site-specific bonding.³⁶⁰ In October 1995, OSM approved those rules.³⁶¹ Given West Virginia's adoption of rules implementing the site-specific bonding requirements of West Virginia Code section 22-3-12, West Virginia Code section 22-3-12(f) became irrelevant and was stricken from the West Virginia Code during the 2002 Legislative session.³⁶²

³⁵⁵ See West Virginia Regulatory Program, 67 Fed. Reg. 37,610, 37,610 (May 29, 2002).

³⁵⁶ See *D.K. Excavating, Inc. v. Miano*, 549 S.E.2d 280, 283 (W. Va. 2001); 30 C.F.R. § 732.17(g) (2003).

³⁵⁷ See West Virginia Regulatory Program, 67 Fed. Reg. at 37,613, 37,616.

³⁵⁸ W. VA. CODE § 22-3-12(f) (2001) (repealed 2002).

³⁵⁹ See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,450 (Dec. 28, 2001).

³⁶⁰ See *id.*

³⁶¹ See *id.* at 67,446. Those rules are codified at W. VA. CODE ST. R. § 38-2-11(11.5) (2004).

³⁶² See West Virginia Regulatory Program, 66 Fed. Reg. at 67,450.

2. Addition of West Virginia Code Section 22-3-11(n)

Subsection (n) of West Virginia Code section 22-3-11 was added during the 2002 Legislative session. Subsection (n) provides that if the Legislature makes future changes to West Virginia Code section 22-3-11, federal law requires a federal agency or official to approve those changes before the changes become valid law.³⁶³ This provision is consistent with 30 C.F.R. § 732.17(g), which states that whenever a State proposes to change its state coal mining regulatory program, the State shall immediately submit its proposed changes to the Director of OSM and that no proposed changes to a State program shall take effect until those changes are approved by the Director of OSM.³⁶⁴

3. Clarification of Site Specific Language in West Virginia Code Section 22-3-11(a)

West Virginia Code section 22-3-12 allows an operator to site-specific bond an entire permit.³⁶⁵ West Virginia Code section 22-3-11(a) allows an operator to incrementally bond one area of the permit at a time.³⁶⁶ Prior to Senate Bill 5003's passage, West Virginia Code section 22-3-11(a) required only that each operator furnish a penal bond in the amount of \$1,000 per acre, or a fraction thereof, for the increment of the permit that was to be bonded.³⁶⁷ OSM recommended revising West Virginia Code section 22-3-11(a) to require that the penal bond for a permit that was enjoying incremental bonding be a "minimum" of \$1,000 per acre.³⁶⁸ Otherwise, OSM felt this provision would be arguably inconsistent with West Virginia Code section 22-3-12(b)(1), which requires a penal bond of no less than \$1,000 and no more than \$5,000 per acre or fraction thereof whenever a site enjoys site specific bonding.³⁶⁹

As revised by Senate Bill 5003, West Virginia Code section 22-3-11(a) increases the amount of the penal bond for incremental bonding from \$1,000 per acre to "not less than one thousand dollars nor more than five thousand dollars for each acre or fraction thereof" that is permitted.³⁷⁰ This revision, approved

³⁶³ W. VA. CODE § 22-3-11 (2004).

³⁶⁴ 30 C.F.R. § 732.17(g) (2004).

³⁶⁵ W. VA. CODE § 22-3-12.

³⁶⁶ *Id.* § 22-3-11(a).

³⁶⁷ *See* W. VA. CODE § 22-3-11(a) (2000) (amended 2001).

³⁶⁸ *See* West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,448 (Dec. 28, 2001).

³⁶⁹ *See id.*

³⁷⁰ W. VA. CODE § 22-3-11(a) (2004).

by OSM, clarifies that incremental bonding is subject to the same per-acre bonding rate range as is site-specific bonding.³⁷¹

4. Removal of Cap on Water Treatment Expenditures—West Virginia Code Section 22-3-11(g)

As part of the 7&7 Plan, the West Virginia Legislature eliminated statutory language that prevented the DEP from spending more than twenty-five percent of SRF monies on water treatment.³⁷² In the 2002 legislative session, the Legislature eliminated corresponding language found in the West Virginia Code of State Rules at section 38-2-12(12.5.d).³⁷³ These changes were made in response to required amendments that OSM had imposed on the State regulatory program in October 1995 and December 2001.³⁷⁴

Prior to these revisions in the West Virginia Code and also the Code of State Rules, DEP was restricted in spending money from the SRF for water treatment purposes, without regard to the amount needed to adequately treat such sites and ensure compliance with applicable effluent limitations and water quality standards.³⁷⁵ The deletion of these provisions in the West Virginia Code and the Code of State Rules was necessary to help DEP completely fund the abatement or treatment of pollution discharges of water from bond forfeiture sites.³⁷⁶ Water treatment is an important part of reclamation and in some cases may be required in perpetuity. Such treatment can become very costly at some sites and may require DEP to spend more than twenty-five percent of its SRF, annually, on such treatment.³⁷⁷

³⁷¹ *Id.*

³⁷² Compare W. VA. CODE § 22-3-11(g) (2000) (amended 2001) with W. VA. CODE § 22-3-12(g) (2004).

³⁷³ Prior to the change in the West Virginia Code of State Rules section 38-2-12(12.5.d), the rule read: "Expenditures from the SRF for water quality enhancement projects shall not exceed twenty-five percent (25%) of the funds gross annual revenue as provided in subsection g, section 11 of the [West Virginia] Act." W. VA. CODE ST. R. § 38-2-12(12.5.d) (2000) (amended 2001).

With the change in language made by the Legislature in 2003, section 38-2-12(12.5.d) reads as follows: "In selecting such sites for water quality improvement projects, the Secretary shall determine the appropriate treatment techniques to be applied to the site. The selection process shall take into consideration the relative benefits and costs of the projects." W. VA. CODE ST. R. § 38-2-12(12.5.d) (2004).

³⁷⁴ See West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,902 (Oct. 4, 1995); West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

³⁷⁵ See W. VA. CODE § 22-3-11(g) (2000) (amended 2001).

³⁷⁶ See West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

³⁷⁷ Telephone interview with Charlie Miller, *supra* note 146.

In addition to removing limitations on water treatment expenditures, West Virginia Code section 22-3-11(g) retains the language which states DEP "may," rather than "shall," "use the special reclamation fund for the purpose of designing, constructing and maintaining water treatment systems when they are required for a complete reclamation of the affected lands"³⁷⁸ Ordinarily, the use of the word "may" implies discretion. However, the West Virginia Supreme Court of Appeals has determined that DEP has a mandatory duty to use bond monies for AMD treatment.³⁷⁹ Moreover, the court has also held that West Virginia Code section 22A-3-11(g), now codified as West Virginia Code section 22-3-11(g), imposes upon DEP "a mandatory, non-discretionary duty to utilize monies from the [SRF] . . . , to treat [AMD] at bond forfeiture sites when the proceeds of the forfeited bonds are less than the actual cost of reclamation."³⁸⁰ On December 28, 2001, OSM had required West Virginia to amend SCMRA to specify that monies from the SRF must be used, where needed, to pay for water treatment on bond forfeiture sites.³⁸¹ Subsequent to the imposition of this requirement, OSM realized that a change in the relevant West Virginia Code section dealing with water treatment on a site, section 22-3-11(g), was unnecessary because of the West Virginia Supreme Court's interpretation of that provision in various cases.³⁸² As a result of the West Virginia Supreme Court's ruling in the 1994 *Highlands Conservancy* case,³⁸³ and West Virginia's amendment of some of its administrative rules, OSM removed its required amendment on May 29, 2002, as it felt that West Virginia's mining regulatory program had adopted a mandatory requirement that SRF monies be used for the treatment of mine related pollution discharges.³⁸⁴

³⁷⁸ W. VA. CODE § 22-3-11(g) (2004).

³⁷⁹ See *State ex rel. Laurel Mountain v. Callaghan*, 418 S.E.2d 580, 584 (W. Va. 1992).

³⁸⁰ See *State ex rel. W. Va. Highlands Conservancy, Inc. v. W. Va. Div. of Env'tl. Prot.*, 447 S.E.2d 920, 925 (W. Va. 1994).

Despite the *Laurel Mountain* and *Highlands Conservancy* rulings by the supreme court, which act to modify W.Va. Code section 22-3-11(g), OSM is still requiring that the State amend its program to specify that monies from the SRF must be used, where needed, to pay for water treatment on bond forfeiture sites as it believes that the word "may" in subsection (g) of the Code improperly provides the DEP with the discretion not to use SRF moneys for water treatment. See West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,902 (Oct. 4, 1995); West Virginia Regulatory Program, 66 Fed. Reg. at 67,448.

³⁸¹ See West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

³⁸² See West Virginia Regulatory Program, 67 Fed. Reg. 37,610, 37,612 (May 29, 2002).

³⁸³ *W. Va. Highlands Conservancy, Inc.*, 447 S.E.2d at 920.

³⁸⁴ West Virginia Regulatory Program, 67 Fed. Reg. at 37,612. West Virginia Code of State Regulation section 38-2-12(12.4.d) provides that the Secretary of DEP shall make expenditures from the SRF to complete reclamation and shall take the most effective action possible to remediate AMD. W. VA. CODE ST. R. § 38-2-12(12.4.d) (2004). OSM has apparently interpreted section 38-2-2(2.37) to mean that all applicable effluent and applicable water quality standards must be

5. SRF Monies Not to Be Used to Reclaim AML Lands Eligible for Federal Reclamation Funds—West Virginia Code Section 22-3-11(h)

Senate Bill 5003 amended West Virginia Code section 22-3-11(h) to clarify that

the SRF will not be used to reclaim abandoned mine sites which can be reclaimed using federal AML reclamation funds.³⁸⁵ This change relates to Section 402(g)(4)(B) of SMCRA.³⁸⁶ As enacted on November 5, 1990, Section 402(g)(4)(B) of SMCRA authorizes the use of AML reclamation funds to perform land reclamation on, and treat pollution discharges of water from, (1) unreclaimed sites that were mined after August 4, 1977, under a program other than a permanent regulatory program approved by the Secretary of the Interior, and (2) permanent program bond forfeiture sites with surety bonds for which the surety became insolvent on or before November 5, 1990.³⁸⁷ In both cases, SMCRA authorizes use of AML reclamation funds only if funds available from the bond or other form of financial guarantee or from any other source are not sufficient to provide adequate reclamation or abatement.³⁸⁸

OSM has approved this change in West Virginia Code section 22-3-11(h).³⁸⁹

6. Changes in Use of the Fund for Administrative Expenses

West Virginia Code section 22-3-11(g) previously stated that up to 10 percent of the monies in the SRF could be used for DEP's administrative expenses, including DEP's administration of SCMRA (found in Article 3 of the West Virginia Code), West Virginia's AML program (found in Article 2 of the West Virginia Code), the West Virginia Surface Mine Board, and West Virginia's regulatory program which regulates the surface mining and reclamation of minerals other than coal, also known as the Quarry Reclamation Act (found

met either by the mine operator, or in the case of default, the regulatory agency to which the mine site defaults. *See* West Virginia Regulatory Program, 67 Fed. Reg. at 37,612.

³⁸⁵ W. VA. CODE § 22-3-11(h) (2004).

³⁸⁶ *See* 30 U.S.C. § 1232(g) (2000).

³⁸⁷ *Id.*

³⁸⁸ *See* West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,448 (Dec. 28, 2001).

³⁸⁹ *See id.*

in Article 4 of the West Virginia Code).³⁹⁰ On October 4, 1995, OSM expressed concern about DEP using money from the SRF for any expense not related to bond forfeiture reclamation since the SRF's liabilities at the time exceeded its assets.³⁹¹

Based on a financial analysis that DEP submitted to OSM on November 11, 1985, OSM approved DEP's use of money from the SRF to cover general administrative expense withdrawals for fiscal year 1985-86.³⁹² However, before DEP was allowed to withdraw money from the SRF in subsequent years to pay for administrative expenses, OSM required DEP to submit a comprehensive analysis to OSM demonstrating that sufficient money would be available in the SRF both to complete the approved reclamation plans for any mining area that may be in default at any time and to cover the administrative expense withdrawals allowed by law.³⁹³ Only if OSM agrees with DEP's assessment can DEP withdraw money from its SRF to pay for administrative expenses as the plain language of West Virginia Code section 22-3-11(g) allows.³⁹⁴

Given the deficit in the SRF and the condition it placed in 1985 on DEP's use of SRF funds for administrative expenses, OSM encouraged DEP to modify the language in West Virginia Code section 22-3-11(g) to explicitly limit expenditures from the SRF to administrative expenses dealing with the Special Reclamation Program.³⁹⁵

The Legislature did not adopt OSM's suggestion. As revised, the plain language of West Virginia Code section 22-3-11(g) allows for up to 10 percent of the monies in the SRF to be used for DEP's administration of the SCMRA program, Article 3 of the West Virginia Code, and the Surface Mine Board allows an unlimited amount of money in the SRF to be used for administering the Special Reclamation Program and the Special Reclamation Advisory Council.³⁹⁶ The SRF can no longer be used by DEP to pay for the administrative expenses

³⁹⁰ W. VA. CODE § 22-3-11 (2000) (amended 2001). Prior to the year 2000, W. VA. CODE section 22-4-1 to -29, was designated as the "Surface Mining and Reclamation of Minerals Other Than Coal" Act. W. VA. CODE § 22-4-1 to -29 (1999) (amended 2000). In 2000, the West Virginia Legislature re-designated this Act as the "Quarry Reclamation Act." W. VA. CODE § 22-4-1 (2004).

³⁹¹ See West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,901 (Oct. 4, 1995).

³⁹² See West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

³⁹³ See *id.*

³⁹⁴ See *id.*

³⁹⁵ Letter from Roger Calhoun, Director, Charleston Field Office, Office of Surface Mining, to Michael O. Callaghan, Secretary, West Virginia Department of Environmental Protection (August 28, 2001) (on file with author) (containing an attachment describing OSM's recommended revisions to section 22-3-11(g)).

³⁹⁶ W. VA. CODE § 22-3-11(g) (2004).

DEP incurs in administering the AML program or the Quarry Reclamation Act, found in Chapter 22, Article 4 of the West Virginia Code.

West Virginia Code section 22-3-11, as revised, has been approved by OSM, but only insofar as it allows for up to 10 percent of the SRF to be freely used for administrative expenses relating to DEP's bond forfeiture program.³⁹⁷ These expenses arguably include all administrative expenses DEP incurs while operating its Special Reclamation Program and could include expenses that the Special Reclamation Advisory Council incurs while in the normal course of its operations. These expenses would also likely include expenses that DEP generates while dealing with bond forfeitures as part of its Article 3 regulatory program.

What OSM has not approved is the unchecked expenditures of money from the SRF for expenses associated with the West Virginia Surface Mine Board or DEP's administration of its Article 3 regulatory program, insofar as those expenses are unrelated to bond forfeiture under SCMRA.³⁹⁸ As related by OSM, before making any withdrawals to cover administrative expenses unrelated to bond forfeitures, West Virginia must request and receive OSM concurrence for such withdrawals.³⁹⁹ OSM has stated that to assist in restoring and maintaining the financial solvency of the SRF, its restriction on DEP's withdrawals from the SRF will continue to apply to any withdrawals that are not related to bond forfeiture reclamation administrative expenses.⁴⁰⁰ Because of OSM's conditional approval of West Virginia Code section 22-3-11(g), this Code section has a provision which is not readily apparent from reviewing the plain language of the statute.

7. An Increase in the Base Per Ton Clean Coal Tax

Senate Bill 5003 increases the permanent per ton clean coal tax from three cents per ton to seven cents per ton and imposes an additional seven cent per ton tax for a period of thirty-nine months.⁴⁰¹ The effective date of the eleven cent tax increase was January 1, 2002.⁴⁰² As provided for by West Vir-

³⁹⁷ See West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

³⁹⁸ See *id.*

³⁹⁹ See *id.*

⁴⁰⁰ See *id.*

⁴⁰¹ See W. VA. CODE § 22-3-11(h).

⁴⁰² See *id.* DEP's draft of the 7&7 Plan called for tax collections of the increased tax to begin on January 1, 2002. Intra-office Memorandum from Rita Pauley to Michael Callaghan, *supra* note 346. OSM recommended that tax collections begin upon the date of passage of the bill. *Id.* DEP and the Legislature did not change this part of Senate Bill 5003 in response to OSM's comments and the final version of Senate Bill 5003, as subsequently approved by OSM, called for tax collections of the increased tax to begin on January 1, 2002. See W. VA. CODE § 22-3-11(h).

ginia Code section 22-3-11(h), after thirty-nine months, the SRF tax on tons of clean coal mined is reduced from fourteen cents per ton to seven cents per ton.

The permanent seven cent per ton tax which remains after this reduction “shall be reviewed and, if necessary, adjusted annually by the Legislature upon recommendation of the [Special Reclamation Advisory] council,” pursuant to West Virginia Code section 22-1-17.⁴⁰³ This permanent seven cent per ton tax “may not be reduced until the special reclamation fund has sufficient moneys to meet the reclamation responsibilities of the state established in this section.”⁴⁰⁴ Coal refuse reprocessing operations that require a surface mining permit must also pay the tax on the clean coal obtained by these mining methods.⁴⁰⁵

Early drafts by DEP of a revised West Virginia Code section 22-3-11(g) called for the Special Reclamation Tax to be increased from three cents to seven cents per ton, with the proviso that the “tax shall be reviewed and adjusted, if necessary, every two years after the required recommendation of the Secretary [of DEP] is made to the Legislature on the adequacy of the tax.”⁴⁰⁶ Another provision of proposed West Virginia Code section 22-3-11(g) called for the expiration of the additional seven cents per ton tax on coal on April 1, 2005.⁴⁰⁷ Comments from OSM on August 28, 2001, suggested that the special reclamation tax should not be lowered until the deficit in the State’s Alternative Bonding System was eliminated.⁴⁰⁸ Only some of OSM’s suggestions were incorporated into the final version of Senate Bill 5003.

On September 7, 2001, OSM completed a financial analysis of a draft version of a legislative submission, which called for the special reclamation tax rate to be increased to fourteen cents per ton of clean coal produced.⁴⁰⁹ At that time, OSM concluded that it appeared that a proposed tax rate of fourteen cents for up to thirty-nine months and seven cents thereafter would allow DEP to eliminate the current SRF deficit and meet land reclamation and water treatment needs for several years.⁴¹⁰ OSM’s projections also indicated that, following about a nine-year period of surplus in the SRF, the SRF’s liabilities would exceed its assets and that future increases in the special reclamation tax rate would be necessary at that time to meet land and water reclamation and treatment

⁴⁰³ W.VA. CODE § 22-3-11(h).

⁴⁰⁴ *Id.*

⁴⁰⁵ *See id.*; West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,449 (Dec. 28, 2001).

⁴⁰⁶ Letter from Roger Calhoun to Michael O. Callaghan, *supra* note 395.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *See* West Virginia Regulatory Program, 66 Fed. Reg. at 67,449.

⁴¹⁰ *See id.*

needs.⁴¹¹ Until that time occurs, OSM noted that West Virginia Code section 22-3-11(h) provides several mechanisms, such as the provision that the seven cent per ton special reclamation tax may not be reduced until the SRF has sufficient monies to meet the State's reclamation responsibilities established by law, that will "prevent the [SRF] from deteriorating to a point where its liabilities exceed its assets."⁴¹²

8. Removal of Language Preventing Accumulation of Assets in the SRF

To further assist in shoring up the financial viability of the SRF, Senate Bill 5003 removed language from West Virginia Code section 22-3-11(g) which provided that the special reclamation tax could only be collected when the State's accrued reclamation liabilities exceeded the assets of the SRF.⁴¹³ In effect, this provision had forced the SRF to operate with a deficit for much of its existence. The change made in West Virginia Code section 22-3-11(g) was enacted in response to a required amendment that OSM had imposed on West Virginia's regulatory program in October 1995.⁴¹⁴ In 1995, OSM had noted that section 509(c) of SMCRA requires that an Alternative Bonding System have sufficient money in it to complete the reclamation plan for any site that may be in default at any time.⁴¹⁵ OSM stated that "[a]n alternative bonding system cannot be allowed to incur a deficit if it is to have available adequate revenues to complete the reclamation of all outstanding bond forfeiture sites."⁴¹⁶

The deletion of language in West Virginia Code section 22-3-11(g), the addition of West Virginia Code section 22-3-11(h), and the addition of West Virginia Code section 22-1-17 relating to the creation of the SRF Advisory Council, are all designed to assure that the SRF maintains a positive balance to meet the State's land reclamation and water treatment responsibilities.⁴¹⁷

⁴¹¹ *See id.*

⁴¹² *Id.* at 67449-50.

⁴¹³ Compare W. VA. CODE § 22-3-11(g) (2000) (amended 2001) with W. VA. CODE § 22-3-11(g) (2004).

⁴¹⁴ *See* West Virginia Regulatory Program, 60 Fed. Reg. 51,900, 51,903 (Oct. 4, 1995).

⁴¹⁵ *See id.*

⁴¹⁶ *Id.*

⁴¹⁷ *See* West Virginia Regulatory Program, 66 Fed. Reg. at 67,449-50.

9. The Establishment of a Special Reclamation Fund Advisory Council

West Virginia Code section 22-1-17, a new section of the West Virginia Code, creates a SRF Advisory Council ("Council") to monitor the fiscal health of the SRF and to make reports to the Legislature and the Governor regarding the SRF.⁴¹⁸ The Council has eight members: the Secretary of the Department of Environmental Protection (or designee), the Treasurer of the State of West Virginia (or designee), the Director of the National Mine Reclamation Center at West Virginia University, and five members who are appointed by the Governor with the advice and consent of the State Senate.⁴¹⁹ The original draft of the 7&7 Plan did not call for the Council to include a representative who was a member of the scientific community and experienced in reclamation practices, including water treatment methodology.⁴²⁰ DEP reviewed OSM's suggestion that such a member be included in the Council and as a result, the Director of the National Mine Reclamation Center at West Virginia University became a Council member.⁴²¹

The five Council members appointed by the Governor include one person who represents the coal industry, one member who represents environmental advocacy organizations, one actuary or economist, one member who represents coal miners, and one member who represents the general public.⁴²² Each of the Governor's appointees serves six year terms, which are staggered, and each appointee may be reappointed.⁴²³

Under DEP's draft 7&7 Plan, all members of the Council, including State government officials, were to be compensated the same for serving on the Council.⁴²⁴ OSM suggested that only appointed Council members, not the permanent State government officials who are on the Council, should be compensated for their service on the Council and further recommended that the funds for compensating such members should come from the SRF.⁴²⁵ DEP and the Legislature accepted OSM's suggestions, and as a result appointed Council members are paid the same compensation and expense reimbursement as is provided for members of the Legislature pursuant to West Virginia Code sections

⁴¹⁸ W. VA. CODE § 22-1-17 (2004).

⁴¹⁹ *Id.* § 22-1-17(a).

⁴²⁰ Letter from Roger Calhoun to Michael O. Callaghan, *supra* note 395.

⁴²¹ *Id.*

⁴²² See W. VA. CODE § 22-1-17(b).

⁴²³ See *id.* § 22-1-17(c).

⁴²⁴ Intra-office Memorandum from Rita Pauley to Michael Callaghan, *supra* note 346.

⁴²⁵ Letter from Roger Calhoun to Michael O. Callaghan, *supra* note 395.

4-2A-6 and 4-2A-8.⁴²⁶ Council members who are state employees or officials are not compensated for being on the Council, but they are reimbursed for expenses associated with their work on the Council, in accordance with the policy of the agency for whom they work.⁴²⁷

The Secretary of DEP serves as the chairperson of the Council and calls Council meetings as necessary, but no less frequently than once every six months.⁴²⁸ DEP's Secretary also provides administrative and technical services for the Council.⁴²⁹ Of the Council's eight members, seven vote.⁴³⁰ DEP's Secretary is the Council's lone, *ex officio*, nonvoting member.⁴³¹

Both the Council and the Legislature are charged with determining whether the SRF has sufficient moneys to meet West Virginia's reclamation responsibilities.⁴³² As reflected in the West Virginia Code, Senate Bill 5003 creates the Council to ensure "the effective, efficient and financially stable operation of the [SRF]."⁴³³ As required by West Virginia Code section 22-1-17(f)(1), the Council must "[s]tudy the effectiveness, efficiency, and financial stability of the [SRF] with an emphasis on development of a financial process that ensures the long-term stability of the special reclamation program."⁴³⁴ The Council is charged with identifying and defining problems relating to the SRF, including the enforcement of federal and state law pertaining to contemporaneous reclamation.⁴³⁵ In addition, the Council is charged with analyzing "bond forfeiture collection, reclamation efforts at bond forfeiture sites, and [permittees'] compliance with approved reclamation plans" and modifications to those plans.⁴³⁶ West Virginia Code section 22-1-17(f)(4) requires the Council to "provide a forum for a full and fair discussion of issues relating to the [SRF]."⁴³⁷ West Virginia Code section 22-1-17(f)(6) provides that the Council must "[s]tudy and recommend to the Legislature alternative approaches to the current funding scheme of the [SRF], considering revisions which will assure

⁴²⁶ See W. VA. CODE § 22-1-17(d).

⁴²⁷ See *id.*

⁴²⁸ See *id.* § 22-1-17(e).

⁴²⁹ See *id.*

⁴³⁰ See *id.* § 22-1-17(a), (c).

⁴³¹ See *id.*

⁴³² See *id.* §§ 22-1-17(a), (g), 22-3-11(h).

⁴³³ W. VA. CODE § 22-1-17(a).

⁴³⁴ *Id.* § 22-1-17(f)(1).

⁴³⁵ See *id.* § 22-1-17(f)(2).

⁴³⁶ *Id.* § 22-1-17(f)(3).

⁴³⁷ *Id.* § 22-1-17(f)(4).

future proper reclamation of all mine sites and continued financial viability of the state's coal industry."⁴³⁸ Reclamation of mine sites includes meeting water treatment obligations, and West Virginia Code section 22-1-17(f)(6) provides a mechanism that, if properly implemented, could help assure proper future reclamation.⁴³⁹ OSM interpreted that provision to mean that, "instead of relying solely on a coal production tax, the . . . Council must examine and recommend other funding mechanisms such as a sinking fund, insurance, trust funds or escrow accounts to meet the [SRF's long-term] bond forfeiture reclamation obligations."⁴⁴⁰

In addition to conducting its own study of the issues listed in the subsections of West Virginia Code section 22-1-17(f), the Council is required to contract with a qualified actuary and use that actuary to determine the fiscal soundness of the SRF.⁴⁴¹ Once every four years, the actuary must analyze both the present and future assets and liabilities of the SRF to determine whether the SRF is solvent.⁴⁴² In making his determination, the actuary must consider the financial soundness of the SRF based on both the SRF's current and future assets and liabilities.⁴⁴³ If the current and projected liabilities of the SRF outweigh the current and projected assets, then the SRF is arguably fiscally unsound and measures must be taken to fix this problem.

The actuarial report prepared for the Council's review does not have to be submitted to the Legislature for its review; however, the Council must submit an annual report to the Legislature which discusses the items, such as the actuarial report, the Council has reviewed during the course of its work.⁴⁴⁴ The Council's report must discuss the availability of federal AML funds to reclaim West Virginia's Special Reclamation Program sites and must also discuss the issues studied by the Council under West Virginia Code section 22-1-17(f).⁴⁴⁵

⁴³⁸ *Id.* § 22-1-17(f)(6).

⁴³⁹ See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,448 (Dec. 28, 2001).

⁴⁴⁰ West Virginia Regulatory Program, 67 Fed. Reg. 37,610, 37,614 (May 29, 2002).

⁴⁴¹ See W. VA. CODE § 22-1-17(f)(5).

⁴⁴² See *id.*

⁴⁴³ See *id.*

⁴⁴⁴ See *id.* at § 22-1-17(g). Early drafts of DEP's 7&7 Plan called for a biennial reporting on the adequacy of the reclamation tax. Letter from Roger Calhoun to Michael O. Callaghan, *supra* note 395. OSM felt that a once every two year analysis of the tax's adequacy would not be frequent enough, given the condition of the SRF, and recommended that there be an annual report conducted on the adequacy of the tax for so long as the SRF was experiencing a deficit. *Id.* DEP and the West Virginia Legislature adopted OSM's suggestion. See W. VA. CODE § 22-1-17(g).

⁴⁴⁵ See W. VA. CODE § 22-1-17(g).

Most importantly, the Council's report must tell the Legislature whether the special reclamation tax and fiscal condition of the SRF are adequate.⁴⁴⁶ As part of this analysis, the Council must recommend to the Legislature whether the special reclamation tax should be increased, decreased, or left the same.⁴⁴⁷ When considering whether to recommend to the Legislature an adjustment of the special reclamation tax, the Council is to analyze the "costs, timeliness, and adequacy of bond forfeiture reclamation, including water treatment."⁴⁴⁸ The Council may recommend an increase or a decrease in the tax when the SRF is solvent, but, because of the operation of West Virginia Code section 22-3-11(h), the Council should not recommend that the tax be reduced if it has found that the SRF is insolvent.⁴⁴⁹ OSM has stated that if there are deficiencies in West Virginia's Alternative Bonding System, "the Advisory Council must recommend changes to the Legislature and the Governor to assure that the deficit is eliminated in a timely manner."⁴⁵⁰ In a letter from OSM to DEP dated August 9, 2001, OSM noted that

after the existing backlog of bond forfeiture sites is addressed, it appears the tax rate of 7 cents per ton may only be adequate for a few years. We assume that the newly formed [Council], during this period, will have available sufficient information data to determine the appropriate tax rate to ensure complete reclamation, including water treatment, of existing and future bond forfeiture sites. During the first two years that the 14-cent tax rate is in effect, we will continue to work with you to identify probable long-term treatment needs and to refine cost estimate to determine what the tax rate will be to adequately address those needs.⁴⁵¹

According to OSM, if the Council fulfills its statutory obligations, the West Virginia Legislature and the Governor will have the information and data they need to make sound decisions and effective adjustments to the special reclamation tax rate so that the SRF will maintain a positive balance to meet exist-

⁴⁴⁶ See *id.*

⁴⁴⁷ See *id.*

⁴⁴⁸ *Id.* § 22-1A-1(g)(1).

⁴⁴⁹ See *id.* § 22-3-11(h).

⁴⁵⁰ See West Virginia Regulatory Program, 67 Fed. Reg. 37,610, 37,614 (May 29, 2002).

⁴⁵¹ Letter from Roger Calhoun, Director, Charleston Field Office, Office of Surface Mining, to Michael O. Callaghan, Secretary, West Virginia Department of Environmental Protection (Aug. 9, 2001) (on file with author).

ing and future land and water reclamation obligations.⁴⁵² In its approval of Senate Bill 5003, OSM acknowledged that

[i]n the event that the Legislature and the Governor do not approve the Council's recommendations, [OSM] will reevaluate the adequacy of the State's ABS and, if appropriate, provide notification to West Virginia under 30 CFR 732.17(c) and (e) that it must amend its program to restore consistency with the Federal requirements.⁴⁵³

As previously mentioned, to maintain the adequacy of West Virginia's Alternative Bonding System, the Council may recommend alternative approaches to the funding scheme of the SRF.⁴⁵⁴ The Council may also recommend adjustments in the current special reclamation tax.⁴⁵⁵ It is obvious why the Council would recommend an increase in the special reclamation tax when the SRF is insolvent. However, it may be less obvious as to why the Council would recommend an increase or decrease in the tax when the SRF is solvent.

a. Increasing the Special Reclamation Tax

i. Imminent Harms to the Environment

An increase in the SRF tax may be warranted if reclamation needs to be completed on a more expedited basis. This might occur if there are imminent environmental harms that must be addressed through reclamation. Assume that West Virginia featured 100 sites that needed to be reclaimed. Under an ordinary construction schedule, all 100 sites could be fully reclaimed within a one year period at a cost of twenty million dollars; however, several of these sites may feature conditions that presently pollute the environment. Examples of such pollution might include the deposition of AMD or aquatic life-choking silt into West Virginia's waters. When such pollution is occurring, it may be advantageous to contract for reclamation on an expedited basis that will allow reclamation to be completed within, say, a four-month period. In this case, the costs of reclamation would be higher and an increase in the special reclamation tax to pay for this expedited reclamation would be advantageous. One contemporary example of the need for expedited reclamation on an abandoned mine site can

⁴⁵² See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,448 (Dec. 28, 2001).

⁴⁵³ West Virginia Regulatory Program, 67 Fed. Reg. at 37,614.

⁴⁵⁴ See W. VA. CODE § 22-1-17(f)(6).

⁴⁵⁵ See *id.* § 22-1-17(g)(1).

been seen by reclamation which took place at the Antaeus Gary site in southern West Virginia during the summer of 2002.⁴⁵⁶ In May 2002, after multiple black water discharges from the site, DEP's Special Reclamation Program discovered that two large coal refuse impoundments on the site were in imminent danger of collapsing.⁴⁵⁷ If the refuse impoundments had collapsed, there would be a severe loss of life and/or property in the area surrounding the former mining site, possibly much like that seen in the Buffalo Creek disaster in West Virginia, which took place in the early 1970s.⁴⁵⁸ Given these potential problems, DEP proceeded to reclaim the site on an emergency basis.⁴⁵⁹ This meant that DEP and/or its contractors worked at the site twenty four hours a day, seven days a week from May 4, 2002, through September 30, 2002, to remedy the presented and imminent dangers.⁴⁶⁰ The total cost to DEP of reclaiming the Antaeus Gary site ended up being \$7,645,862.⁴⁶¹ Had DEP not proceeded with emergency reclamation, and the site could have been reclaimed on a normal, non-emergency schedule, the project likely would have taken between fifteen and eighteen months and would have spanned a two year period, as the project would not have been completed within one construction season.⁴⁶² It is difficult to estimate the costs of the project if the project had proceeded under a normal reclamation schedule; however, it is possible that the cost of the project would have been less than it was here.⁴⁶³

Charlie Miller, head of DEP's Special Reclamation Program, reports that had DEP's 7&7 Plan not gone into effect prior to DEP's reclamation of the Antaeus Gary site, work on certain other ongoing DEP reclamation projects likely would have ceased and new projects would not have started, until the Antaeus Gary project had been completed and the SRF had received more per ton coal receipts at its then three cent level.⁴⁶⁴ If more special reclamation sites feature a need to abate imminent environmental harms such as those seen at the Antaeus Gary site, additional pressures will be placed on the SRF, and this may force DEP to petition the Legislature for an increase in the special reclamation tax.

⁴⁵⁶ Telephone interview with Charlie Miller, *supra* note 146.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.*

⁴⁶⁴ Telephone interview with Charlie Miller, *supra* note 146.

ii. The Goals of the Special Reclamation Program Change

An increase in the special reclamation tax may also be warranted if the SRF is currently solvent but DEP finds that the components of its reclamation program are not sufficiently protecting the environment, the scope of the reclamation DEP requires must change, and this enlarged scope of reclamation is accompanied by increased cost. An example of this situation might be seen in the treatment of water pollution from a mine site. Assume, for example, that DEP must currently treat water emanating from a mine site to ensure that levels of iron, acidity, manganese, and aluminum are not higher than the technology based water quality limitations currently placed on those constituents. These limits might currently feature a daily maximum and a monthly average. Also, assume that the cost of treating the water to ensure that those constituents are not present in levels above their daily maximum or monthly average allowable levels is currently \$5,000 per month. If DEP decided to treat more constituents, or was required to reduce the existing contamination of the current constituents to lower levels, say from 3 mg/L to 1 mg/L, then the monthly cost of water treatment at a site would likely increase. This increase might require a corresponding increase in the special reclamation tax.

iii. The Number of Bond Forfeiture Sites Increases

As of June 30, 2004, West Virginia's Special Reclamation Program included 433 unreclaimed bond forfeiture sites.⁴⁶⁵ If this number materially increases, the SRF will need more money to reclaim these sites. Current revenues from the special reclamation tax may not be great enough to fund reclamation at these additional sites; such a scenario would force a change, either a tax increase or some other change, to reestablish the solvency of the State's Special Reclamation Program.

b. *Reducing the Special Reclamation Tax*

Discretionary reductions in the reclamation tax may be warranted if the interest return on monies invested in the SRF combined with the annual receipt of special reclamation taxes produce a SRF surplus that is projected to cover the cost of all outstanding bond forfeiture reclamation, including water treatment. In the present case, however, it appears as though this will not happen, at least in the short run.

⁴⁶⁵ REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL TO THE WEST VIRGINIA LEGISLATURE app. M (August 10, 2004) [hereinafter REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2004] (on file with author).

c. *Otherwise Modifying the Current Scheme of the Special Reclamation Fund*

In addition to recommending tax increases and decreases, the Council may also choose to recommend changes in the very structure of West Virginia's SRF. The Council is charged with maintaining the present and future solvency of the SRF; tax adjustments may not be sufficient or the preferred method of maintaining the SRF's solvency. Changes to the structure of the SRF could come in many different forms; one change might involve the adoption of a funding system similar to that recommended by the Hicks Report in lieu of, or in addition to, the current SRF system.

Making even the most minute structural changes to West Virginia's SRF currently requires direct legislative approval as West Virginia's SRF is embedded in provisions of West Virginia Code which cannot be altered without the assent of the Legislature. As demonstrated by the history of West Virginia's Alternative Bonding System, requiring prior legislative approval for changes in the SRF can often be an inefficient way to solve funding shortfalls in the SRF. If the current Alternative Bonding System continues to struggle with its adequacy, it might be appropriate for the Council to advocate the creation of an SRF that can more quickly respond to realized shortfalls in the SRF. This SRF might allow DEP and OSM to make modest changes in the SRF without requiring prior legislative approval and also allow the Legislature to maintain a general oversight role over changes made by DEP in the SRF program.

E. *The Legislature's Current Role in Further Modifying West Virginia's Alternative Bonding System*

After the Council makes its annual findings and reports those findings to the West Virginia Legislature, it is the Legislature's current responsibility under the law to review those findings and to subsequently make the final determination as to whether the SRF has enough money in it to meet West Virginia's reclamation responsibilities.⁴⁶⁶ If the Legislature determines that there are insufficient monies in the SRF to meet West Virginia's reclamation responsibilities, then it must act to assure that there is enough money in the SRF to meet West Virginia's reclamation responsibilities.⁴⁶⁷

OSM has stated, and the Federal District Court for the Southern District has noted, that

⁴⁶⁶ See W. VA. CODE § 22-3-11(h) (2004); West Virginia Regulatory Program, 67 Fed. Reg. 37,610, 37,615 (May 29, 2002).

⁴⁶⁷ See West Virginia Regulatory Program, 67 Fed. Reg. 37,615.

in the event that the Legislature and the Governor do not approve the Council's recommendations, we will reevaluate the adequacy of the State's [Alternative Bonding System] and, if appropriate, provide notification to West Virginia under 30 CFR § 732.17(c) and (e) that it must amend its program to restore consistency with Federal requirements.⁴⁶⁸

If the Legislature does not maintain the solvency of the SRF by adopting the suggestions of the Council, West Virginia will have to begin implementing the federal bonding program and OSM may ultimately take over West Virginia's reclamation bonding program, eliminating the primacy of regulation that West Virginia currently enjoys in this area.

VIII. JUDICIAL REVIEW OF CHANGES MADE BY SENATE BILL 5003 TO WEST VIRGINIA'S BONDING PROGRAM

Prior to the implementation of Senate Bill 5003, the West Virginia Highlands Conservancy continued its civil action in the federal District Court for the Southern District of West Virginia against OSM and others seeking judicial relief for what the Highlands Conservancy perceived as inadequacies in West Virginia's bonding program and OSM's lack of oversight in correcting those inadequacies. Following the commencement of this civil action, the Legislature amended West Virginia's Alternative Bonding System by adopting Senate Bill 5003. Despite the implementation of Senate Bill 5003, the Highlands Conservancy maintained its challenge to West Virginia's Alternative Bonding System, claiming that the amended system was still inadequate to meet the requirements of SMCRA and that OSM, in its oversight role over DEP, should not be allowing DEP to maintain and implement West Virginia's bonding laws, as revised by the West Virginia Legislature in 2001 and 2002.⁴⁶⁹ On June 26, 2002, the Highlands Conservancy argued that OSM's continued approval of West Virginia's Alternative Bonding System and OSM's failure to adequately respond to the Highland Conservancy's comments on this bonding program "were arbitrary, capricious, and inconsistent with SMCRA."⁴⁷⁰ As relief, the Highlands Conservancy requested that the court order OSM to set aside its approval of West Virginia's amended Alternative Bonding System on December 28, 2001 and May 29, 2002, take over West Virginia's bonding program, and "issue only site-specific, full cost bonds to cover the costs of reclamation."⁴⁷¹ The Highlands Conservancy also requested that the court force OSM to imme-

⁴⁶⁸ *Id.* at 37,614.

⁴⁶⁹ *W. Va. Highlands Conservancy v. Norton*, 238 F. Supp. 2d 761, 765 (S.D. W. Va. 2003).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

diately undertake “a full and complete site-specific analysis of all water and land reclamation liabilities” that coal operators were responsible for in West Virginia and then complete a thorough actuarial risk analysis in a two year time period of all of reclamation liabilities owed by companies.⁴⁷²

One of the Highlands Conservancy’s complaints against OSM concerned OSM’s December 2001 partial approval of West Virginia’s Alternative Bonding System. The Highlands Conservancy maintained that OSM could not grant partial approval to West Virginia’s Alternative Bonding System.⁴⁷³ The Highlands Conservancy felt that OSM must either entirely reject or entirely approve West Virginia’s Alternative Bonding System and that partial approval would only cause the Alternative Bonding System to suffer what it had suffered over the last twenty plus years: infinitely small and unending improvements which tinkered with West Virginia’s Alternative Bonding System but never allowed it to reach a statutorily satisfactory end.⁴⁷⁴ Judge Haden responded by noting that “OSM has promised to make its final and determinative decision” on the adequacy of West Virginia’s Alternative Bonding System by no later than May 28, 2002, “so the spectre Plaintiff raises is unreal.”⁴⁷⁵ Haden noted that “the Court and the public have OSM’s promise, if the amendment is not approved, [OSM’s] Part 733 proceedings [to take over the State’s Alternative Bonding System program] will begin.”⁴⁷⁶

On May 29, 2002, OSM fully approved the changes made by Senate Bill 5003 to the State’s Alternative Bonding System.⁴⁷⁷ OSM found that the amendments to the State Alternative Bonding System were adequate to eliminate the SRF’s \$47.9 million deficit in about three years.⁴⁷⁸ OSM also gave the caveat that further review needed to be conducted of West Virginia’s Alternative Bonding System to ensure continued adequacy.⁴⁷⁹ Prior to its approval of changes made to West Virginia’s Alternative Bonding System by Senate Bill 5003, OSM predicted that at the expiration of the nine-year period following the passage of Senate Bill 5003, further adjustments in the SRF would be needed to pay for the completion of bond forfeiture reclamation, including water treatment.⁴⁸⁰

⁴⁷² *Id.*

⁴⁷³ *See* W. Va. Highlands Conservancy v. Norton, 190 F. Supp. 2d 859, 868 (S.D. W. Va. 2002), *modified by* 238 F. Supp. 2d 761 (S.D. W. Va. 2003).

⁴⁷⁴ *Id.* at 868-69.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *See* West Virginia Regulatory Program, 67 Fed. Reg. 37,610 (May 29, 2002).

⁴⁷⁸ *See id.* at 37,613.

⁴⁷⁹ *See id.* at 37,615.

⁴⁸⁰ *See* DAVID G. HARTOS & CAREY, OFFICE OF SURFACE MINING RECLAMATION AND

OSM's May 29, 2002 approval of West Virginia's amendments to its Alternative Bonding System were followed by a hearing on the Highlands Conservancy's motion for summary judgment and permanent injunction against OSM on the adequacy of West Virginia's Alternative Bonding System. On January 9, 2003, Haden found that OSM had not acted arbitrarily, capriciously, or otherwise inconsistent with the law in approving West Virginia's Alternative Bonding System as revised by the West Virginia Legislature in 2001 and 2002.⁴⁸¹ In the court's words, OSM's responses to, calculations of, and projections of the fiscal health of the current West Virginia Alternative Bonding System, and its current approval of that program, such as it is, are "based on reasonable consideration of the relevant factors."⁴⁸²

In support of its attempt to obtain a permanent injunction against OSM, the Highlands Conservancy had argued that "OSM may only approve an [Alternative Bonding System] that is fully sufficient, at the time of its approval, to cover all potential defaults" which might occur in West Virginia's mining industry.⁴⁸³ OSM had responded by saying that "as long as the [7&7 Plan] amendment [to the law] provides a mechanism for remedying [Alternative Bonding System] inadequacies in a reasonable fashion, we can approve it as being consistent with 30 C.F.R. § 800.11(e)."⁴⁸⁴ The court noted that OSM, importantly, conditioned its approval of West Virginia's Alternative Bonding System upon the future actions of the State of West Virginia, and in particular, the actions of the State Legislature and Governor.⁴⁸⁵ In the court's words,

[T]he current deficit [in West Virginia's SRF] is evidence of an inadequate rate, but not the inability of an Alternative Bonding System structured like that of West Virginia to provide sufficient funds, when needed. The inadequacy [of the SRF] can be corrected by an adequate rate increase and a mechanism to ensure the rate keeps pace with reclamation needs, once the deficit is eliminated.⁴⁸⁶

ENFORCEMENT, U.S. DEP'T OF THE INTERIOR, A REPORT ON THE '7-UP' PLAN: A FINANCIAL ANALYSIS OF WEST VIRGINIA'S INFORMAL PROPOSAL TO MODIFY THE ALTERNATIVE BONDING SYSTEM OF THE WEST VIRGINIA SURFACE MINING REGULATORY PROGRAM 7 (2001); *see also* West Virginia Regulatory Program, 66 Fed. Reg. at 37,613.

⁴⁸¹ W. Va. Highlands Conservancy v. Norton, 238 F. Supp. 2d 761 (S.D. W. Va. 2003).

⁴⁸² *Id.* at 773.

⁴⁸³ *Id.* at 767.

⁴⁸⁴ *Id.* (quoting West Virginia Regulatory Program, 67 Fed. Reg. at 37,614).

⁴⁸⁵ *See id.* at 773.

⁴⁸⁶ *Id.* at 771.

The court noted that during the 2001 Legislative Session the law was adjusted to increase the special reclamation rate and that a mechanism, the Special Reclamation Advisory Council, was established to ensure that the reclamation tax will keep pace with reclamation needs.⁴⁸⁷ The court also noted that if the Alternative Bonding System becomes inadequate and the Legislature and the Governor do not properly act to rectify this inadequacy, it will be incumbent upon OSM to withdraw its approval of West Virginia's Alternative Bonding System and to take over the bonding of coal mining operations in West Virginia.⁴⁸⁸

IX. A REVIEW BY THE SPECIAL RECLAMATION ADVISORY COUNCIL OF RECENT CHANGES MADE TO WEST VIRGINIA'S BONDING AND RECLAMATION PROGRAM

In January 2003, the Special Reclamation Advisory Council completed its first annual report on the status of the SRF under the new bonding laws.⁴⁸⁹ This report analyzed the operation of the SRF during the 2002 calendar year and contained several interesting findings, recommendations, and predictions.⁴⁹⁰ The Council's report provides some prediction as to the future of the SRF and the West Virginia SCMRA bonding program.⁴⁹¹

A. *Significant Increase in Revenues From the Increase in the SRF Tax*

According to the Advisory Council's report, had DEP not increased the Special Reclamation Tax from three cents to fourteen cents per ton of clean coal mined, the SRF's revenues for calendar year 2002 would have only been \$4,252,899.⁴⁹² As it was, the SRF's revenues for the months of February, 2002, through December, 2002, were \$14,353,438.⁴⁹³ Without the increase in the special reclamation tax from three cents to fourteen cents for the thirty nine month period, the SRF's revenues would have been \$10,100,539 less. While an improvement over prior receipts, monthly tax receipts for 2002 were lower than those contemplated by OSM for 2002 prior to the implementation of Senate Bill 5003.⁴⁹⁴ In December, 2001 OSM projected that at production levels then being

⁴⁸⁷ See *id.* at 771-73.

⁴⁸⁸ See *id.* at 773-74.

⁴⁸⁹ REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2003, *supra* note 319.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 2 tbl. 1.

⁴⁹³ See *id.*

⁴⁹⁴ See West Virginia Regulatory Program, 66 Fed. Reg. 67,446, 67,448 (Dec. 28, 2001).

attained, the new fourteen cent tax would increase cash flow into the SRF by about \$1.9 million/month.⁴⁹⁵ As it was, cash flow into the SRF, at least during the year 2002, only increased by \$1,029,106 per month—a significant difference.⁴⁹⁶ Due to a weak economic market for coal, OSM's statements in May 2002 that the new 7&7 Plan will generate sufficient revenues at its current per ton assessment levels to eliminate the reclamation deficit that existed in 2001 in about three years may prove to be incorrect.⁴⁹⁷

B. Unplanned Expenditures From the Fund in the Year 2002

While the SRF experienced higher revenues in 2002 due to the implementation of the 7&7 Plan, it also incurred higher than expected expenditures due to DEP's reclamation of the Antaeus Gary site.⁴⁹⁸ In its report, the Advisory Council noted that the approximately \$7.6 million DEP was required to expend on the site was "unanticipated and affected short-term cash flow dramatically."⁴⁹⁹ While the Antaeus Gary situation is hoped to be an aberration, the SRF must be ready to respond to such aberrations to maintain its short term and long-term solvency.

C. Additional Program Activities by DEP

As a result of its receipt of the SRF's increased revenues in 2002, DEP was able to modify treatment and reclamation plans on abandoned mine sites, purchase new support equipment, hire and train new personnel, and plan and start reclamation for additional abandoned mine sites.⁵⁰⁰ During 2002, DEP's Special Reclamation Program contracted for \$11.9 million of reclamation on mining sites abandoned after 1977.⁵⁰¹ By April of 2003, DEP had already en-

⁴⁹⁵ *Id.*

⁴⁹⁶ See REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2003, *supra* note 319, at 2 tbl. 1.

⁴⁹⁷ See West Virginia Regulatory Program, 67 Fed. Reg. 37,610, 37,613 (May 29, 2002).

⁴⁹⁸ See REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2003, *supra* note 319, at 3 tbl. 2.

⁴⁹⁹ *Id.*

⁵⁰⁰ See *id.* at 3, 5, apps. D, E, J, K, L, M, and N.

⁵⁰¹ Telephone interview with Ramona Dickson, Department of Environmental Protection Fiscal Services, Office of Administration (Apr. 17, 2003). This \$11.9 million figure is somewhat skewed given DEP's emergency expenditure encumbrance of \$7.6 million at the Antaeus Gary site during 2002. Telephone interview with Charlie Miller, Special Reclamation Office, West Virginia Department of Environmental Protection (Apr. 17, 2003). Nevertheless, even discounting all of the Antaeus Gary expenditures, the DEP was able to perform more reclamation in 2002 (\$2.2 million worth more) after the passage of Senate Bill 5003 than it was able to perform during 2001 prior to changes in the bonding law. *Id.*

tered into contracts for \$7.2 million worth of reclamation work for fiscal year 2003.⁵⁰² These figures compare favorably with the Special Reclamation Program's expenditures on reclamation prior to the passage of Senate Bill 5003. In 2001 before Senate Bill 5003 took effect, the Special Reclamation Program, due to fiscal limitations imposed on its budget by prior law, was only able to spend \$2.08 million on reclamation projects.⁵⁰³

As mentioned, DEP continues to hire new personnel to help it fulfill its special reclamation responsibilities.⁵⁰⁴ The hiring of new personnel is critical to the speed at which DEP can complete reclamation of bond forfeiture sites. Whenever DEP conducts a special reclamation project, it prepares a reclamation plan for the site based on the reclamation plan in the permit, or one which otherwise meets the requirements of the State and federal mining regulatory programs.⁵⁰⁵ Through West Virginia's bidding process, DEP then hires private construction contractors to perform reclamation on the site.⁵⁰⁶ DEP must ensure that the contractors are performing reclamation on schedule and in accordance with the plans and specifications that are incorporated into the contract entered into between the contractor and DEP. When DEP has more inspectors, it can oversee reclamation at a larger number of sites simultaneously.⁵⁰⁷ The fact that DEP hired six new inspectors and filled several other positions during 2002 means that it will be able to complete reclamation at a larger number of sites within a given time period than it had been able to do prior to 2002. To meet its increased workload, DEP plans to continue its hiring of new personnel, increasing the number of positions in its Special Reclamation Program from 10.25 to 27.15 full time equivalent positions.⁵⁰⁸ Funding for these positions will come from the SRF and OSM.⁵⁰⁹

D. *Recommendations as to Future Water Treatment Systems*

One of the charges of the Advisory Council is to "provide a forum for a full and fair discussion of issues relating to the SRF."⁵¹⁰ The discharge(s) of

⁵⁰² Telephone interview with Charlie Miller, *supra* note 501.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ Telephone interview with Charlie Miller, *supra* note 146.

⁵⁰⁹ *Id.*

⁵¹⁰ See W. VA. CODE § 22-1-17(f)(4) (2003).

polluted water from an abandoned mine site is one of the most vexing problems which DEP must contend with when reclaiming that site.

In its January, 2003 report, the Council recommended that DEP develop a process for "identifying environmental risk of individual site discharges."⁵¹¹ Specifically, the Council suggested that "environmental risk assessment should evaluate the threat to the receiving stream if the discharge is untreated."⁵¹² This risk assessment would include an analysis of the special reclamation site's pollutant loadings and an analysis of the quality and assimilative capacity of streams into which runoff from the site occurs.⁵¹³ The Council suggested that "for many sites, particularly those discharging into polluted streams, it may make more sense to invest in a single[,] in-stream [treatment system] higher up [in] the watershed, thus recovering more miles of stream at a more manageable cost."⁵¹⁴

While this particular Advisory Council's recommendation is certainly laudable, time will tell as to whether this recommendation can be implemented. One impediment to this future treatment approach may be the future implementation of West Virginia's new anti-degradation rules.⁵¹⁵ To comply with new anti-degradation rules, it may be necessary to place treatment systems at each abandoned mine site; constructing a "regional" treatment system for a watershed may not meet anti-degradation requirements.

E. Future Concerns With the Adequacy of the Special Reclamation Fund

One important concern raised by the Advisory Council's year 2003 report is that the SRF's future revenues may be outpaced by its future expenditures. In its report, the Advisory Council refrained from suggesting that the Special Reclamation tax should be increased in the 2003 West Virginia Legislative session, "[g]iven the short duration of available data and the current adequacy of the [current] revenues."⁵¹⁶

However, the Council also noted that "the projected cash flow balance in 2003 presents a concern to the Council."⁵¹⁷ "Given the projected balance of

⁵¹¹ See REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2003, *supra* note 319, at 7.

⁵¹² *Id.*

⁵¹³ See *id.*

⁵¹⁴ *Id.*

⁵¹⁵ See M. Ann Bradley & Joseph M. Dawley, *West Virginia's Anti-degradation Policy for State Waters: From Theoretical Construct to Implementation Procedures*, 103 W. VA. L. REV. 301 (2001), for a good discussion of new anti-degradation rule requirements.

⁵¹⁶ REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL 2003, *supra* note 319, at 7-8.

⁵¹⁷ *Id.* at 7.

the [SRF] in 2003 the Council will formally consider a recommendation to change the rate or duration of [the] SRF tax in our 2003 mid-year meeting.”⁵¹⁸

These sentiments were echoed in a speech made to the West Virginia Coal Association on January 10, 2003 by the-then Secretary of the Department of Environmental Protection Michael Callaghan. While speaking to the Coal Association, Secretary Callaghan noted that the SRF tax may need to be increased as early as 2004 and that the Advisory Council will probably recommend an increase in the permanent tax by one to two cents for the year 2004.⁵¹⁹ Such an increase would raise the permanent tax from seven cents a ton to eight or perhaps nine cents a ton of clean coal mined.⁵²⁰

Callaghan noted that a lower than expected projected year 2003 fund balance was likely as a result of two factors: one, a decrease in statewide coal production during 2002, and two, the unexpected emergency expenditures by DEP on the Antaeus Gary project between May/June and November of 2002.⁵²¹ While the approximately \$7.6 million spent on the Antaeus Gary site was a one-time expenditure and the site will not require future payments from the SRF, DEP may be required to undertake similar emergency reclamation efforts at other special reclamation sites in the future. Buttressing DEP against these future, unplanned expenditures and possible reductions in tax receipts from the special reclamation tax may justify future increases in the per ton coal tax currently imposed by statute.

X. PREDICTING THE FUTURE OF WEST VIRGINIA’S RECLAMATION BONDING PROGRAM

Where do West Virginia’s Alternative Bonding System and Special Reclamation Program go from here?

In its evaluation report for West Virginia’s mining regulatory program for the year 2003, OSM noted that while the year 2001 changes in West Virginia Alternative Bonding System had not resulted in a perfect system, those changes “provide a basis from which DEP can initiate action to ensure the long-term success” of its Alternative Bonding System.⁵²² OSM noted that the year 2001 changes have allowed DEP to “hire additional bond forfeiture reclamation staff, continue its effort to eliminate the Alternative Bonding System deficit, begin work on the backlog of more than 400 unreclaimed bond forfeiture sites within West Virginia, and to initiate treatment of polluttional discharges at sites that

⁵¹⁸ *Id.*

⁵¹⁹ See Ward, *supra* note 345, at 5B.

⁵²⁰ Under this suggestion, however, the additional seven cent per ton tax imposed by West Virginia Code section 22-3-11 would still expire on schedule.

⁵²¹ See Ward, *supra* note 345, at 5B.

⁵²² ANNUAL EVALUATION SUMMARY REPORT 2003, *supra* note 2, at 6.

require such treatment.”⁵²³ The main feature of the 2001 changes—the increased special reclamation tax—has generated, on average, about \$18.6 million annually for West Virginia’s reclamation efforts which include long term treatment of polluttional discharges coming from bond forfeiture sites.⁵²⁴ Whether this level of revenue generation will be sufficient remains to be seen. As of June 30, 2004, DEP still had a backlog of 433 bond forfeited abandoned mine lands that it had to reclaim.⁵²⁵ DEP’s total estimated liability for reclaiming those sites and other sites featuring ongoing water treatment was \$50,358,728.⁵²⁶ As of July 31, 2004, DEP’s total estimated liability for reclaiming its bond forfeited sites, including those needing long term water treatment, totaled \$69,224,693, while its SRF balance totaled only \$32,719,509.⁵²⁷ Whether revenues generated from the tax increases that went into effect starting in 2001 will be sufficient to produce enough revenue to both address the backlog and current reclamation needs of West Virginia’s Special Reclamation Program remains to be seen. Estimating the future of the SRF on a long-term basis is very difficult due to the dependency of the SRF on the uncertain future health of the coal industry. If the coal industry is healthy, it will produce a large number of tons of coal and this will bolster the revenues of the SRF. A healthy coal industry may also produce fewer abandoned mine sites and put less of a strain on DEP’s Special Reclamation Program. On the other hand, an ill industry will produce less revenue for the SRF and may at the same time increase the outlays needed from the SRF if there are an increased number of abandoned mine sites that DEP has to take over.

Unfortunately, the health of the mining industry is extremely difficult to predict. Thus far, an actuarial study has not been conducted to determine with any certainty what the failure rate of coal companies will be. Being incapable of predicting the rate at which coal companies fail, the rate at which the State of West Virginia will be forfeiting permits in the future, the numbers of acres associated with those forfeited permits which will need to be reclaimed, and the cost of reclaiming those acres makes it virtually impossible to predict, at least on a long-term basis, the financial needs of West Virginia’s Special Reclamation Program.

If short-term or long-term shortfalls are projected in the Special Reclamation Program, further increases in the permanent seven-cent per ton reclamation tax are possible. Besides increasing the per-ton of coal tax, other changes

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ See REPORT OF THE SPECIAL RECLAMATION FUND ADVISORY COUNCIL, *supra* note 465, at app. M.

⁵²⁶ See *id.*

⁵²⁷ Telephone interview with Charlie Miller, Special Reclamation Office, West Virginia Department of Environmental Protection (Aug. 16, 2004).

in the West Virginia Special Reclamation Program may be proposed. One suggestion has been "to apply the Special Reclamation Tax to all coal produced, not just clean coal."⁵²⁸ So far, however, proposals to change the Special Reclamation Program remain just that—proposals.

XI. CONCLUSION

West Virginia's attempts to ensure proper environmental reclamation of coal mined lands began well before the 1977 passage of SMCRA. However, both prior to and after SMCRA's passage, the goal of properly and completely reclaiming all unreclaimed, abandoned coal mine sites has been difficult to attain.

Often a coal company will abandon a mining site before finishing site reclamation. Rather than leave that site unreclaimed and in a condition that will harm the environment, state and federal governments have stepped in to reclaim the site.

In West Virginia, DEP's Special Reclamation Program takes care of reclaiming sites abandoned by coal operators after 1977. The Special Reclamation Program's efforts are funded through contributions by existing coal permittees, be it contributions from per acre bonding requirements, civil penalties, or a generalized tax on those permittees' production of coal. Unfortunately, the Special Reclamation Program's efforts to reclaim mine sites abandoned after 1977 have been chronically underfunded due to the historically legally inadequate nature of West Virginia's reclamation program, including its post-1977 SCMRA Alternative Bonding System. Underfunding of DEP's reclamation efforts has resulted in a situation where today, thousands of acres of unreclaimed and abandoned mine sites sit idle, open to the ravages of nature and primed to harm the environment.

Legislation passed in 2002 has attempted to address this funding shortfall. As a result of the passage of DEP's 7&7 Plan and the increased revenues that resulted from this plan, DEP's Special Reclamation Program has been able to make progress in eliminating the backlog of unreclaimed mine sites throughout West Virginia. Whether a legal structure is now in place that will guarantee the elimination of the backlog of unreclaimed mine sites and the expeditious reclamation of newly abandoned and unreclaimed mine sites remains to be seen. One must hope that West Virginia's seemingly eternal struggle to achieve a fiscally and environmentally adequate coal mining reclamation bonding program will eventually reach a satisfactory end.

⁵²⁸ Interoffice Memorandum from Roger Green, West Virginia Division of Environmental Protection, to Pat Park 1 (Jan. 8, 1999).

